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No._____

In The

Supreme Court of the United States

October Term, 1984

CITY OF LAWTON, OKLAHOMA, a municipal corporation; **STEVEN WERTZ;** and **KENT DUNEGAN,**

Petitoners,

vs.

SOLOMON LUSBY, VAUGHN LUSBY and **ALVIN JERARD LUSBY,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1985

QUESTIONS PRESENTED

1. QUESTION: Whether a single or isolated incident of misconduct, on the part of one (1) "off-duty" police officer acting as a private security guard, combined with the actions of two (2) "on-duty" police officers, regarding the arrest of a suspected shoplifter at a private mercantile establishment, will establish a sufficient basis to impose "official policy" liability against a municipality under the provisions of 42 U.S.C. § 1983?

2. QUESTION: Whether it is fundamentally fair for the Court of Appeals to wrench from the trial record a new, appellate finding of "official policy" liability, based on issues not pled, not considered by the trial court, not litigated by the parties and not submitted to the jury?

3. QUESTION: Whether the appellate finding of municipal liability under § 1983 (i.e., based on an official policy "of not conducting any independent investigation" of

an arrest made by a private citizen, "delegates a

nondelegable duty" and constitutes the surrender of "a state inquisitional right,") conflicts with the liability standards enunciated in Monell v. Department of Social Services, 436 U.S. 658 (1978) and related decisions?

4. QUESTION: Whether Respondents' failure to comply with the Political Subdivision Tort Claims Act (51 O.S. 1981 § 151 et seq) of the State of Oklahoma absolutely extinguished Respondents' pendent state-law tort claims of false arrest, assault, defamation, and malicious prosecution asserted against the City of Lawton and its two police officers?

LIST OF PARTIES

The only other party to this proceeding, who is not listed in the caption of this Petition, is T.G.&Y. Stores, Inc., an Oklahoma corporation. Based on information provided to them, the Petitioners believe that T.G.&Y Stores, Inc. is a wholly-owned subsidiary of Household Merchandising, Inc.

Petitioners herein believe and understand that T.G.&Y. Stores, Inc., will file a separate Petition for Writ of Certiorari in this matter on or before May 9, 1985 (See Order Extending Time, Justice White "T.G.&Y. Stores, Inc. v. Solomon Lusby, et al., A-750").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The City Attorney of the City of Lawton, Comanche County, State of Oklahoma, on behalf of the City of Lawton, Steve Wertz and Kent Dunegan, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

The City of Lawton, Oklahoma, third largest city of that state, is a home-rule, charter municipality and a political subdivision of the State of Oklahoma.

OPINIONS BELOW

The November 23, 1984, opinion of the Tenth Circuit Court of Appeals is reported at 749 F.2d 1423 and appears at Appendix B hereto (App. B, infra, pp. 13a to 52a). The Order of the Court of Appeals denying a Petition for Rehearing en banc is attached hereto as Appendix C (App. C, infra, pp. 53a to 54a).

The Judgment of the United States District Court for the Western District of Oklahoma appears as Appendix D to this Petition (App. D, infra, pp. 55a to 56a) and is not reported.

JURISDICTIONAL STATEMENT

The judgment and decision of the Court of Appeals (App. B) was entered on November 23, 1984. A petition for rehearing en banc, time filed, was denied on January 9, 1985 (App. C). On the 9th day of April, 1985, Mr. Justice White extended the time for the filing of a petition for Writ of Certiorari to, and including, April 29, 1985.

Jurisdiction of this Court to review the judgment below is conferred by, and invoked under, the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

1. Constitutional Law. Involved with the issues arising from this case are certain constitutional rights found in the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Fourth Amendment reads in its entirety:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment to the Federal Constitution states as follows:

> "Section 1. All persons born or naturalized in the United States,d and subject to the jurisdiction thereof, are citizens of the Udnited States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall lany State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Statutory Law. Applicable to this matter are certain provisions of the Civil Rights Act of 1871, particularly 42 U.S.C., § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

In addition, the provisions of 28 U.S.C., § 1652, regarding the applicability of state law in federal proceedings, are also involved in this matter. 28 U.S.C., § 1652, states as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

3. State Statutory Law. Statutory laws of the State of Oklahoma bearing on this case are three (3) statutes dealing with the authority of private citizens to make arrests, to wit: 22 Okla. Stat. 1981, §§ 187, 202 and 205. Section 187 of Title 22 Okla. Stat. 1981 reads:

> "An arrest may be either:

1. By a peace officer, under warrant,

2. By a peace officer without a warrant; or,

3. By a private person."

22 Okla. Stat. 1981, § 202, states:

"A private person may arrest another:

1. For a public offense committed or attempted in his presence.

2. When the person arrested has committed a felony although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

22 Okla. Stat. 1981, § 205, provides:

"A private person who has arrested another for the commission of a public offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer."

Regarding the authority of a law enforcement officer to arrest a person reasonably suspected of stealing merchandise from retailers or wholesalers, 22 Okla. Stat. 1981, § 1342, states as follows:

"Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner."

Finally, appearing as Appendix A to this Petition are the provisions of 51 Okla. Stat. Supp. 1979, § 151 et seq, commonly referred to as "The Political Subdivision Tort Claims Act" of the State of Oklahoma. The statutory language found in Appendix A is the act as it existed on July 1, 1979, and during the period that Respondents' state law claims accrued. Presently, this same statutory provision is now codified as 51 Okla. Stat. 1981, § 151 et seq.

STATEMENT OF THE CASE

Invoking the prophetic observations of Mr. Justice Powell in his concurring opinion in Monell v. Department of Social Services, 436 U.S. 658, "difficult question" continues to remain and:

> There are substantial line-drawing problems in determining" when execution of a government's policy or custom" can be said to inflict constitutional injury that "government as an entity is responsible under § 1983" 436 U.S. 658 at 714.

Petitioners herein, City of Lawton, Oklahoma, a municipal corporation ("Lawton" or "City") and two of its police officers, Steve Wertz ("Wertz") and Kent Dunegan ("Dunegan") respectfully present this matter for the purpose of

resolving some of the "difficult questions" that continue to abound after the Monell decision.

This case arises out of an incident which occurred on July 6, 1979, in a variety or general merchandise store in Lawton, Oklahoma, owned and operated by T.G.&Y Stores, Inc. ("T.G.&Y."). T.G.&Y. also brings a separate Petition for Certiorari. After a T.G.&Y. security guard (who was an off-duty police officer) requested a receipt for a pair of sunglasses, a struggle ensued, resulting in the arrest of all three Respondents. After their detention or arrest at the store, Respondents were transported to the Lawton City Jail by two (2) on-duty police officers, Petitioners Wertz and Dunegan.

The Respondents originally filed their Complaint in the United States District Court for the Western District of Oklahoma on June 23, 1980, alleging numerous theories of recovery. The Complaint also charged that the T.G.&Y. security guard, the City and its officers had singled out members of Lawton's Black community for physical and mental harassment. Further,

Respondents claimed that City of Lawton, Oklahoma, was negligent in its training, selection, education, and discipline of its police officers and that this condition arose to the status of a "municipal policy" for which the City was liable. It was further alleged that these Petitioners were also liable to Respondents for pendent state claims involving false arrest, assault, defamation, and malicious prosecution.

The Respondents charged that recovery was appropriate pursuant to 42 U.S.C. § 1983. The trial court jurisdiction over matters asserted by Respondents was based on the provisions of 28 U.S.C. § 1343(3) and the doctrine of pendent jurisdiction.

Respondents, until submission of the case to the jury, asserted that Petitioners and T.G.&Y. were racially motivated in their action toward Respondents and actually asserted a claim under 42 U.S.C. § 1981. However, these § 1981 claims were never successfully developed by Respondents and were abandoned by them. Similarly, Respondents' claims of conspiracy based on 42

U.S.C. §§ 1985, 1986 did not bear fruit. Although conspiracy issues were submitted to the jury, the jury retained verdicts in favor of all defendants (Petitioners) on the issue of conspiracy.

The trial court submitted seven theories of liability to the jury as to each Respondent. As to Respondent Solomon Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest, and the malicious prosecution claim. As to Respondent Vaughn Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest claim, the assault and battery claim and the malicious prosecution claim. As to Respondent Alvin Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest claim and the malicious prosecution claim. A more descriptive treatment of the jury verdicts is found in the Court of Appeals Opinion, affirming the jury verdict. (App. B. pp. 15a-16a).

There was no showing or evidence at trial that any incident similar to this particular event had occurred in the past. Further, the municipal liability of the Petitioner Lawton

was restricted to allegations of failure to properly hire, train, or supervise its police employees. Restriction of Lawton's liability to these issues is unequivocally born out by the liability issue regarding Lawton which was submitted to the jury. (App. E)

REASONS FOR GRANTING THE WRIT

1. The Question of a "Single Incident" Providing a Basis for Municipal Liability Under § 1983 Has Yet to Be Decided by This Court; the Decision Below Conflicts with Decisions of Other Circuit Courts on This Same Issue.

As indicated in the Statement of the Case (above) and the Tenth Circuit's Opinion (App. B), there exists no finding that prior indicents of a similar nature had occurred at the T.G.&Y. store--or any other mercantile establishment in the City of Lawton, Oklahoma. Certainly, no such prior incidents were urged by the Respondents, nor were any such previous occurrences cited by the trial or appellate courts. Indeed, there was no proof that prior to this incident an alleged shoplifter had ever been arrested by an off-duty police officer at

the T.G.&Y. store. Everything tends to show that this was an isolated, single incident.

From reported decisions a general proposition on § 1983 liability imposed on local governments (or supervisory officials) emerges: a single act or isolated incident is insufficient to establish liability. Turpin v. Mailet, 619 F.2d 196 (2d Cir., 1980) cert. den. 449 U.S. 1016; Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir., 1984); Wellington v. Daniels, 717 F.2d 932 (4th Cir., 1983); Lanquirand v. Hayden, 717 F.2d 220 (5th Cir., 1983); Hays v. Jefferson County, 668 F.2d 869 (6th Cir., 1982); Powe v. City of Chicago, 664 F.2d 639 (7th Cir., 1981); Baker v. McCoy, 739 F.2d 381 (8th Cir., 1984); McClelland v. Facteau, 610 F.2d 693 (10th Cir., 1979); and Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir., 1984). Petitioners submit that the Court of Appeals decision in this case irreconcilably conflicts with persuasive authority holding that an isolated event does not create "policy liability" in a § 1983 matter.

Interestingly, the Circuit Opinion hereto attached is strangely silent with regard

to prior decisions on the matter from its own Tenth Circuit. McClelland v. Facteau, supra. In the recent case of Cowdrey v. City of Eastborough, 730 F.2d 1376 (10th Cir., 1984), the Tenth Circuit opined that an "isolated instance of police misconduct without more is not sufficient to raise a fact issue whether the alleged constitutional violation was caused... by any other official act or omission." 730 F.2d 1376, 1379. It is submitted that this Court, applying the Tenth Circuit's own pronouncements, should reverse this matter.

Most importantly, these Petitioners know of only two appellate decisions that have determined a "single" or "isolated" incident might serve as basis for the imposition of corporate or municipal liability under a § 1983 action. In Owen v. Haas, 601 F.2d 1242 (2d Cir., 1979) cert. den. 444 U.S. 980, it was held where a group of seven (7) prison guards, some of them supervisors, savagely beat a prisoner, that municipal liability might be imposed for lack of training based on a "single brutal incident."

The second matter, as with this case, comes form the Tenth Circuit and the very same (Western District of Oklahoma) trial court, namely: Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir., 1984) cert. granted __U.S.__, 105 S.Ct. 79, 83 L.Ed.2d 27. In the Tuttle case, it was held that recovery against the municipal employer was possible based on a "single incident" when the facts demonstrate a complete lack of training.

As above noted, this court has already granted certiorari in the Tuttle case (No. 83-1919). These Petitioners submit that this matter should also be accepted by the Court in order to fully access the "single incident" rule under the contrasting facts of this instant case versus the circumstances present in the Tuttle case.

2. The Opinion of the Tenth Circuit Creates Its Own Appellate "Official Policy" and Adjudges Petitioner Lawton Liable Without Trial--the Appellate-Made Policy Was not Considered by the Trial Court, Was Not Litigated by the parties and Was Not Submitted to the Jury.

Without doubt the most interesting passage of the Court of Appeals Opinion in this matter is the following:

> "...we need not consider whether the city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether allegations of police officer brutality sufficed to establish a pattern of such misconduct. (App B,

In view of mountains of discovery, in view of the expenditure of vast sums on approximately twenty (20) depositions, in view of an eight (8) day trial, in view of an 1800 page trial transcript, in view of the arguments of counsel, and in view of the court's instructions to the jury, the above passage is more than incredible. This was the precise issue of l bility regarding City submitted to the jury by the trial court. (App. E)

Evidently, the Tenth Circuit determined that Respondents' attempt to prove municipal liability based on lack of supervision, lack of training, prior misconduct, etc., was a total failure. However, City begs this Court to read Instruction No. 15 regarding the liability of the City for § 1983 claims given at trial (App. E). What were the jury issues on City's

liability: negligent training, failure to supervise and police misconduct. For whatever Respondents' evidence amounted to, all of it dealt with training-supervision-misconduct issues. With respect to the Petitioner Lawton's liability, that was what this case was about. It was not about: "an impermissible city policy that delegates a non-delegable duty." (App. B)

City is fully aware that "theory of the pleadings" or "theory of action" doctrines have been effectively abolished by the Federal Rules of Civil Procedure. However, fundamental fairness and due process are not abolished. The shifting of legal issues from one to another is limited and must stop when it prejudices the opposing party. Armstrong Cork Co. v. Lyons, 366 F.2d 206, 209 n.3 (8th Cir., 1966); Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 714 (8th Cir., 1979); Wright & Miller, Federal Practice and Procedure §§ 1219 (pp. 141-143) and § 2662 (p. 133).

This appellate created municipal liability "goes too far" and works to the severe prejudice of City. Petitioner City submits that, given fair notice and fair opportunity to respond to the context of this "appellate" finding of municipal liability, City might well demonstrate that the "appellate policy" is constitutional, or, at least totally neutral. Alas, City has not been given a chance.

3. The Appellate Court's Finding of Municipal Liability Conflicts with Principles Previously Announced in Monell and Related Cases.

Monell, supra, held that liability attaches to a municipality "...when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." The official policy or custom must be the "moving force" of the constitutional violation. Custom has been defined as "the settled practices of

state officials which transform private predilections into compulsory rules of behavior no less than legislative pronouncements." Adickes v. Kress & Co., 398 U.S. 144; Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 352.

In order for liability to exist, the series of events must be attributed to either Lawton's governing body or an official to whom that body had delegated policy-making authority. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir., 1984); Rookard v. Health and Hospitals Corp., 710 F.2d 41, 45 (2d Cir., 1983).

4. State law articulated by State Courts controls pendent state tort claims attached to a federal claim brought under § 1983.

From the time of its enactment, and then for almost ninety years, the provisions of 42 U.S.C. § 1983 laid moribund. Not until this Court rendered its decisions in Monroe v. Pope, 365 U.S. 167 (1961), and Monell, supra, did § 1983 attain its present status as a substantial contributor to the federal civil caseload. [Statistical information revealing a "swelling tide of § 1983 actions" threatening to "engulf the federal courts" is found in Thurmon v.

Rose, 575 F.Supp. 1488, 1491 n.4 (N.D. Ind., 1983).] With the increase in § 1983 litigation, pendent state claims--usually common law torts based on the same operative facts as give rise to the constitutional claim--have also experienced a similar increase.

Today, in the § 1983 litigation involving actions of a municipal police department (as in the instant case) it is not unusual for the defendants to face a whole host of state torts: assault, battery, malicious prosecution, false arrest, libel, false imprisonment, slander, and intentional infliction of emotional harm. As a result, jury instructions at trial, dealing with both federal and state claims, may state seven or eight grounds of liability based on the same set of operative facts.

It is beyond dispute that state law governs the assertion of state law claims which are pendent to federal litigation. 28 U.S.C. § 1652. In the instant case, because Petitioners are a municipal government and two of its police officers, a special Oklahoma

statute applies, namely: "The Political Subdivision Tort Claims Act," 51 Okla. Stat. 1981 § 151 et seq. (App. A), hereinafter called "Tort Claims Act." In the exercise of pendent jurisdiction, federal courts are bound to apply state law. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). A state law pendent claim asserted in federal court must be treated and determined as if the same were asserted in the state tribunal. This indisputable principle is strongly stated in Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252 (1964) at 257:

> "Pendent jurisdiction permits a federal court under some circumstances to determine a state cause of action which otherwise would have to be heard in the state court. Hurn v. Oursler, supra. But if the state court would be without authority to award damages under state law, then the doctrine of pendent jurisdiction can give "the District Court...no greater power to do so." Lauf v. Shineer & Co., 303 U.S. 323, 328 82 L.Ed. 872, 877, 58 S.Ct. 578.

The question evolves: Would an Oklahoma tribunal reach the same determination, as Tenth Circuit Court, that Respondents had substantially complied with the notice requirements of 51 O.S. 1981 §156? (App. A, pp. 5a-6a) The City of Lawton respectfully submits that an

Oklahoma tribunal, applying the appropriate Oklahoma law, would reach a totally opposite conclusion, namely: no compliance (substantial or otherwise) with state law provisions requiring written notice of tort claims against political subdivisions or their employees.

Regarding compliance with state law notice provisions, the City of Lawton takes issue with the Court of Appeals characterization of Gent and Hargraves as "Lawton City employees" when they attempted to secure a civil release of liability for their off-duty employer, T.G.&Y. Stores. (App. B, p. 41) A release running in favor of T.G.&Y. Stores was of no earthly use to the City of Lawton.

Petitioner City of Lawton is mindful that an off-duty police officer may well be a state actor for § 1983 purposes. However, the gaping flaw in the Court of Appeals Opinion is failure to address state law--Oklahoma decisions that must be followed in disposing of these pendent state claims. For a beginning, Oklahoma law treats an off-duty officer who undertakes employment as a private citizen, representing only the private interests of his

private employer. Stewart v. State, 527 P.2d 22 (Okl. Crim., 1974) Stewart specifically holds:

> "We therefore hold that as a matter of law when an off-duty police officer accepts private employment and when engaged in this private employment he becomes a private citizen...."

It is undisputed that both individuals (Gent and Hargraves) mentioned in the Court of Appeals Opinion were "off-duty" when these events occurred. Petitioner submits that the Opinion's characterization of these two men as "Lawton City employees" for purposes of compliance with the notice provisions of the Tort Claims Act is not only clearly, but totally, erroneous. No one would seriously argue that giving notice to a "private citizen" is substantial compliance with 51 O.S. 1981 § 156.

The Tenth Circuit Opinion cites Duesterhaus v. City of Edmond, 634 P.2d 720 (Okl., 1981), in support of the proposition that substantial compliance has been accepted by the Oklahoma Supreme Court. City grants that. However, in Duesterhaus notice was given to a high managerial official, i.e., the City Attorney. It was not given to two off-duty police

officers acting as private citizens for their private employer. Indeed, Duesterhaus explicitly requires that the "substantially complied" notice be given to a supervisory or management employee, 634 P.2d 720, 722. Without putting the information in the right hands, how can the purposes of the statute (investigation, repairs, settlement and financial planning) be fulfilled? In Graves v. Rose, 633 P.2d 733 (Okl., 1983), notice of claim given to an "on-duty" bus driver, involved in an accident while driving a school bus, was held not to constitute substantial compliance. Surely, the Oklahoma Supreme Court would give no different ruling where two "off-duty" police officers received notice while working for the "off-duty" employer.

City submits that each of three (3) factors must exist before a claimant can be held to have substantially complied with 51 O.S. 1981, § 156 (App. A, pp. 5a-6a): (1) the notice must be given to a supervisory or managerial employee; (2) the substituted notice must be timely given, i.e., within the 120-day period set by § 156; and (3) the notice must be

a claim for or demand for compensation and not merely notice or knowledge of an injury or incident. These factors are distilled from the following Oklahoma cases: Reirdon v. Wilburton Bd. of Education, 611 P.2d 239 (Okl., 1980); Duesterhaus, supra; Johns v. Wynnewood Bd. of Education, 656 P.2d 148 (Okl., 1982); Graves, supra; Horinek v. Bd. of County Comm'rs. of Kay County, 667 P.2d 479 (Okl. App., 1983); Neal v. City of Blackwell, 670 P.2d 587 (Okl., 1983); Maxwell v. Independent School Dist. No. 32, Okfuskee County, 672 P.2d 1179 (Okl. App., 1983); and Ross v. City of Shawnee, 683 P.2d 535 (Okl., 1984).

In every (Reirdon and Duesterhaus) case where substantial compliance was found by Oklahoma decisions involving § 156, all three (3) of the above mentioned factors were present. In every case above cited, ruling that the claim was barred for failure to comply with § 156, namely, Johns, Graves, Horinek, Neal, Maxwell, and Ross, at least one of these three (3) determining factors was absent.

Just what affirmative action did the Respondents Lusby take to give notice (strict,

substantial, or any at all), in a timely manner, to a supervisory or managerial City employee that they claimed monetary compensation from the Petitioners City, Wertz, and Dunegan? None. The record in this proceeding is totally devoid of any matter showing compliance, or even attempted compliance, with the state notice requirements. The Opinion of the Tenth Circuit expressly states that the Respondents (Lusbys) did not give written notice before filing suit. (App. B) The first, the initial written claim of the Respondents was their federal complaint filed June 23, 1980.

Petitioner City of Lawton submits that the clear import of the above Oklahoma case law makes the Tort Claims Act a substantive statute of limitations. Therefore, the giving of notice, or proving substantial compliance therewith, is an essential element of the cause of action. "No action for any cause arising under this Act shall be maintained unless valid notice has been given...." 51 O.S. 1981 § 156(c) (App. A, p. 5a) The Appellate Opinion assertion that "§ 156(b) does not bar plaintiffs' pendent claims" (App. B, p. 42a) is just

plain wrong in light of § 156(c). Further, the Tenth Circuit's reference to the fact that Respondent's pendent malicious prosecution claims did not arise until their dismissal on February 17, 1980, is interesting but pointless. Giving notice "by filing suit" does not constitute compliance with the Tort Claims Act and specifically contravenes 51 O.S. 1981 §§ 156(b), 156(c), and 157. Graves, supra, 633 P.2d 733, 734; Horinek, supra 667 P.2d 479, 480.

Finally, considering the "lump sum" verdict in this case (App. B, pp. 15a-16a), it is apparent that it reflects findings of liability on state torts that should have never been submitted to the jury. Under the Tort Claims Act, the federal court had no jurisdiction over these state claims asserted against the City, Wertz and Dunegan.

Clearly, the Tenth Circuit is stretching Oklahoma law--to the point of ignoring the same--in order to protect the tainted and flawed verdict. Sixty-seven percent (67%) of

the constituent issues (false arrest and malicious prosecution) composing the total liability of Petitioners City, Wertz and Dunegan to Respondent Solomon Lusby are based on barred state claims. Fifty percent (50%) of the constituent issues (malicious prosecution) composing these Petitioners' total liability to Respondent Vaughn Lusby are based on barred state claims. Seventy-five percent (75%) of the constituent issues (assault, false arrest and malicious prosecution) composing these Petitioners' total liability to Respondent Alvin Lusby are based on barred state claims. Petitioners did all they could to prevent this situation: the trial court should have upheld these Petitioners' motion to dismiss Respondents' state law claims for failure to plead compliance with the Tort Claims Act. And, further, the trial judge should have sustained Petitioners' motion for a directed verdict on these state law claims at close of plaintiffs' evidence, and the close of all evidence, for failure to prove compliance with the Tort Claims Act.

Petitioners submit that Oklahoma decisional and statutory authorities unequivocally demonstrate that Respondents' state law claims are barred, divesting the federal trial court of all jurisdiction over the same. Be there any doubt, Petitioners stand ready to move that this particular state law question be certified to the Supreme Court of the State of Oklahoma.

CONCLUSION

For the above stated reasons, it is urged by these Petitioners that this Petition for Certiorari should be granted.

Respectfully submitted,

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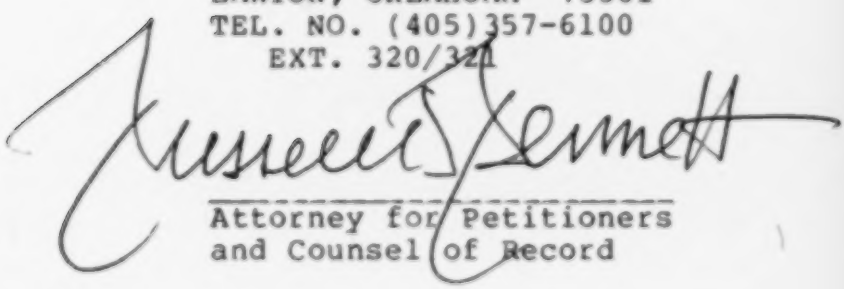

Attorney for Petitioners
and Counsel of Record

APPENDIXES

APPENDIX A: STATE STATUTORY PROVISIONS

POLITICAL SUBDIVISION TORT CLAIMS ACT OF THE STATE OF OKLAHOMA

Title 51, Okla. Stat. Supp. 1979 §§151 to 166, inclusive, and §170 [as amended and in effect on July 1, 1979; and effective at the time of the accrual of Respondents' (Lusby brothers) pendent state claims].

§ 151. Short Title.--This act shall be known and may be cited as "The Political Subdivision Tort Claims Act."

§ 152. Definitions.--As used in this act:

1. "Agency" means any board, commission, committee, department or other instrumentality or entity designated to act in behalf of a political subdivision.

2. "Employee" means any person who is acting or who has acted in behalf of a political subdivision or an agency whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies and other persons designated to act for an agency or political subdivision, but shall not include independent contractors.

3. "Loss" means injury or death of a person or damage to real or personal property.

4. "Municipality" means any incorporated city or town, and all institutions, agencies or instrumentalities of a municipality.

5. "Scope of employment" means an employee was acting in the performance of the duties of the office or employment or was performing tasks lawfully assigned by a competent authority.

6. "Political subdivision" means:

a. a municipality;
b. a school district;
c. a county; or
d. a public trust where a city, town, school district or county is a beneficiary;

and all their institutions, instrumentalities or agencies.

§ 153. Liability--Scope--Exemptions.--Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee.

§ 154. Extent of liability.--**A.** The liability of a political subdivision or an employee on claims within the scope of this act shall not exceed:

1. Twenty-five Thousand Dollars ($25,000.00) to any claimant for any number of claims for damage to or destruction of property, including consequential damages arising out of a single accident or occurrence;

2. Fifty Thousand Dollars ($50,000.00) to any claimant for all other claims arising out of a single accident or occurrence; or

3. Three Hundred Thousand Dollars ($300,000.00) for any number of claims arising out of a single occurrence or accident.

B. No award for damages on any claim against a political subdivision or employee shall include punitive or exemplary damages. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

C. When the amount awarded to or settled upon multiple claimants exceeds the limitations

of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant his proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the occurrence.

§ 155. Exemptions from liability.--A political subdivision or an employee acting within the scope of his employment shall not be liable if a loss results from:

1. Legislative functions;

2. Judicial or quasi-judicial functions;

3. Execution or enforcement of the lawful orders of any court;

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to any charter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance or the failure to exercise or perform any act or service which is in the discretion of the political subdivision or its employees;

6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police or fire protection;

7. Any claim based on the theory of attractive nuisance;

8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

9. Entry upon any property where that entry is expressly or impliedly authorized by law;

10. Natural conditions of unimproved property of the political subdivision;

11. Assessment or collection of taxes or special assessments;

12. Licensing powers or functions including,but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority where the authority is discretionary under law;

13. Inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, or any property other than the property of the political subdivision to determine whether the property complied with or violates any law or contains a hazard to health or safety;

14. Any claim covered by the Oklahoma Workers' Compensation Act (Section 1 et seq. of Title 85) or any claim covered by the Oklahoma Unemployment Compensation Act; (Section 211 et seq. of Title 40)

15. Absence, condition or malfunction of any traffic or road sign, signal or warning device unless the absence, condition or malfunction is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties except on failure of the political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of any political subdivision to initially place any of the above signs, signals or warning devices when such failure is the result of a discretionary act of the political subdivision. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

16. Any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages;

17. Misrepresentation, if unintentional;

18. An act or omission of a person other than an employee;

19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee; or

20. Participation in or practice for any interscholastic athletic contest.

§ 156. Claims--Petition--Limitation of actions--Notice--Wrongful death.--A. Any person having a claim against a political subdivision or an employee within the scope of this act shall petition the political subdivision for any appropriate relief including the award of money damages.

B. A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with the clerk of the governing body of the political subdivision within one hundred twenty (120) days after the loss occurs.

C. The written notice of claim shall state the time, place and circumstances of the claim and the amount of compensation or other relief demanded. Failure to state either the time, place, circumstances and amount of compensation demanded shall not invalidate the notice unless the claimant declines or refuses to furnish such information within ninety (90) days after demand by the political subdivision. No action for any cause arising under this act shall be maintained unless valid notice has been given and the action is commenced within six (6) months after notification of denial of the claim by the clerk of the political subdivision. The time for giving written notice of claim does not include the time during which

the person injured is unable due to incapacitation from the injury to give such notice, not exceeding ninety (90) days of incapacity.

D. When the claim is one for death by wrongful act or omission, notice may be presented by the personal representative, surviving spouse or next of kin or other legal representative or the consular officer of a foreign country of which the deceased was a citizen, within one (1) year after the alleged injury or loss resulting in such death. Provided, however, if the person for whose death the claim is made has presented notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

§ 157. Notice of approval or denial of claim.--Within ninety (90) days after receiving the filing of a claim, the clerk of the political subdivision shall notify the claimant in writing of the approval or denial of the claim. A claim is denied if the political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the interested parties have reached a settlement before the expiration of that period. A person may not initiate a suit against a political subdivision or employee whose conduct gave rise to the claim unless the claim has been denied in whole or in part.

§ 158. Settlement or defense of claim--Effect of liability insurance.--A. The political subdivision, after conferring with authorized legal counsel, may settle or defend against a claim or suit brought against it or its employee under this act subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, and may appropriate money for the payment of amounts agreed upon. When the amount of any settlement exceeds Two Thousand Five Hundred Dollars ($2,500.00), the settlement shall not be effective until approved by the district court and entered as a judgment as provided by law.

B. If a policy or contract of liability insurance covering the political subdivision or

its employees is applicable, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, payment and defense of claims or suits against the political subdivision or its employees covered by the policy. However, the insurer may not enter into a settlement for an amount which exceeds the insurance coverage without the approval of the governing body of the political subdivision or its designated representative if the political subdivision is insured.

C. Nothing in this section shall be construed to repeal or modify Sections 361 through 365.6 and 435 of Title 62 of the Oklahoma Statutes and it is intended that this section be construed in conformance with those sections.

§ 159. Enforcement of judgments.--A. Judgments recovered against political subdivisions under the provisions of this act shall be enforced in the same manner and to the same extent as judgments are now enforced against such political subdivisions under the law except as herein provided.

B. If the judgment is obtained against a political subdivision that has procured a contract or policy of liability or indemnity insurance protection, the holder of the judgment may use the methods of collecting the judgment which are provided by the policy or contract or law to the extent of the limits of coverage provided.

C. For the payment of any judgment obtained under the provisions of this act against a political subdivision that is a self-insurer or not fully covered by liability insurance, the manner of paying a money judgment shall be as follows. Proof of indebtedness, as required in Sections 263 through 364 of Title 62 of the Oklahoma Statutes and evidence of any estimated tax levy or increases necessary to reimburse the sinking fund for the purposes of the judgment as provided in Section 431 of Title 62 of the Oklahoma Statutes, and other evidence or statements which the court may require, shall

be made to the court before final judgment is rendered. As an alternative to paying the money judgment out of the sinking fund at the rate of one-third (1/3) each year, the court, based on consideration of evidence and proof, may provide for the judgment to be paid over a period of not less than one (1) nor more than ten (10) years. The interest rate on any judgment when payment is extended more than three (3) years shall be at the rate prescribed by law for the first three (3) years and at the rate of six percent (6%) for each remaining year.

§ 160. Injuries for which political subdivision liable--Recovery of payments--Limitation of actions.--A political subdivision shall be liable for injury or damage proximately caused by an act or omission of an employee within the scope of his employment if the act or omission would, except as otherwise provided herein, have given rise to a cause of action against the employee or his personal representative. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of fraud or corruption of the employee, nor for any punitive or exemplary damages against an employee, nor for payment of any costs, judgments or settlements which are paid through an applicable contract or policy of insurance. The political subdivision shall have the right to recover any payments made by it for any judgment, or portion thereof, and costs or fees by or on behalf of an employee's defense if the employee fails to cooperate in good faith in the defense of the claim or action. A judgment or settlement in an action or claim under this act shall constitute a complete bar to any action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement.

§ 161. Duty to defend, save harmless and indemnify employees--Payment of settlements and judgments.--A. The governing body of a political subdivision shall defend, save harmless and indemnify any of its employees against any tort claim or other demand, regardless of the merits of the claim arising out of an alleged act or

omission occurring within the scope of employment.

B. The political subdivision shall pay or cause to be paid any judgment or settlement against an employee for any claim or action in the manner provided by Sections 8 and 9 of this act (Sections 158, 159 of this title) if:

1. The act or omission upon which the settlement or judgment is based occurred within the scope of the employee's employment;

2. The employee's conduct which gave rise to the claim resulting in the judgment or settlement was not because of fraud or corruption of the employee; and

3. The employee reasonably cooperated in good faith in the defense of the claim or action.

If the above requirements are met, an employee may recover payments made by him for any settlement or judgment against him or any portion thereof and any costs or fees incurred by or on behalf of his defense. Nothing in this section shall be construed to authorize a political subdivision to pay for any punitive or exemplary damages rendered against an employee, nor to allow a political subdivision to pay for any judgment, settlement, costs or fees which are paid or covered by any applicable policy or contract of insurance.

§ 162. Constitutional or statutory rights, privileges or immunities--Violation by employee--Defending--Indemnification--Right of recovery--Punitive or exemplary damages.--A. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:

1. Provide a defense for any employee when liability is sought for any violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States when alleged to have been committed by the employee while acting within the scope of employment; and

2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee; and any costs or fees for a violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment.

B. A political subdivision shall have the right to recover from an employee the amount expended by the political subdivision to provide a defense, or pay a settlement agreed to by the employee and the political subdivision, or pay the final judgment, if it is shown that the employee's conduct which gave rise to the action was fraudulent or corrupt or if the employee fails to reasonably cooperate in good faith in defense of the action.

C. Nothing in this section shall be construed to authorize a political subdivision to pay for any punitive or exemplary damages rendered against an employee, nor to allow the political subdivision to pay for any defense, judgment, settlement, costs or fees which are paid or covered by any applicable policy or contract of insurance.

§ 163. Venue--Parties--Service of process--Evidence of Insurance.--Actions against all political subdivisions or their employees within the scope of this act shall be brought in the county in which the situs of the political subdivision is located or in the county in which the cause of action arose. Suits instituted pursuant to the provisions of this act shall name as defendant the political subdivision against which liability is sought to be established. In suits against political subdivisions the petition and summons shall be served in the manner prescribed by law for civil cases generally. If no method is prescribed by law, then service may be had on the administrative head of the political subdivision being sued, if available, and if not, the

court in which the suit is pending may authorize service in such manner as may be calculated to afford the political subdivision a fair opportunity to answer and defend the suit. No attempt shall be made in the trial of any action brought against any political subdivision or employee within the scope of this act to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of the plaintiff.

§ 164. Application of Oklahoma laws and statutes and rules of procedure.--The laws and statutes of the State of Oklahoma and the Rules of Civil Procedure, as promulgated and adopted by the Supreme Court of Oklahoma insofar as applicable and to the extent that such rules are not inconsistent with the provisions of this act, shall apply to and govern all actions brought under the provisions of this act.

§ 165. Exempt claims.--This act does not apply to any claim against any political subdivision or employee arising before the effective date of this act. Any such claim may be presented and enforced to the same extent and subject to the same procedures and restrictions as if this act had not been adopted.

§ 166. Governmental and proprietary functions of political subdivisions--Application of act.--The distinction existing between governmental functions and proprietary functions of political subdivisions shall not be affected by the provisions of this act; however the provisions of this act shall apply to both governmental and proprietary functions.

§ 167. Insurance.--Omitted.

§ 168. School districts--Insurance.--Omitted.

§ 169. Counties--Insurance.--Omitted.

§ 170. Application of laws.--This act is exclusive and supersedes all home rule charter provisions and special laws on the same subject

heretofore, and all acts or parts of acts in conflict herewith are repealed.

APPENDIX B: OPINION BELOW

Decision of the United States Court of Appeals for the Tenth Circuit

filed November 23, 1984, and reported 749 F.2d 1423 (1984)

[NOTE: footnotes are set out as endnotes and follow the text of the opinion]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 & 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON, OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-80-751-W)

Russell D. Bennett, City Attorney, (Gerald S. Rakes, Assistant City Attorney, with him on the briefs), Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

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Russell D. Bennett, City Attorney, (Gerald S. Rakes, Assistant City Attorney, with him on the briefs), Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

Michael W. Hinkle (Page Dobson and Ronald R. Hudson with him on the briefs) of Holloway, Dobson, Hudson & Bachman, Oklahoma City, Oklahoma, for Defendants-Appellants T.G.&Y. Stores, Inc., and Charles Gent.

Gretchen A. Harris (Jack LUSBY. Kinzie, also of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Oklahoma, and Linda G. Scoggins of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, with her on the briefs) for Plaintiffs-Appellees.

Before LOGAN and McWILLIAMS, Circuit Judges, and CAMPOS, District Judge.*

LOGAN, Circuit Judge.

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*Honorable Santiage E. Campos, United States District Judge for the District of New Mexico, sitting by designation.

These appeals arise out of judgments in favor of plaintiffs Solomon Lusby, Vaughn Lusby, and Alvin Lusby--three brothers--who asserted civil rights and pendent state tort claims against the City of Lawton, Oklahoma, two of its police officers, Kent Dunegan and Steve Wertz, T.G.&Y. Stores, Inc., and Charles Gent, another Lawton police officer who was serving while off-duty as a security guard at a T.G.&Y. store in Lawton at the time of the disputed incidents. The jury returned a verdict for all plaintiffs on their 42 U.S.C. § 1983 claims against each of the defendants. On the pendent claims there were differences in the verdicts: on false arrest Solomon and Alvin won against all defendants although Vaughn won only against Gent and T.G.&Y.; on malicious prosecution Solomon and Alvin received a verdict only against Wertz, Dunegan, and the city, and Vaughn succeeded only against Gent and T.G.&Y.; on assault and battery only Alvin prevailed and only against Wertz. The verdict form did not require the jury to separate damages on the particular claims, except among the categories actual, nominal, and punitive. The judgments

against each defendant were as follows (all actual damages except as indicated):

	Solomon	Vaughn	Alvin
Gent	$1,000	$ 3,000	$ 2,000
T.G.&Y.	4,000	16,000 & 50,000 punitive	
Wertz	2,000	1,000	2,000
Dunegan	2,000	1,000	1,000
City of Lawton	6,000	4,000	10,000

The jury found for the plaintiffs on defendant Gent's counterclaim for assault and battery. The trial court entered judgment on the verdicts and awarded attorney's fees to plaintiffs pursuant to 42 U.S.C. § 1988.

The city and police officers Wertz and Dunegan appeal, contending that the trial court erred (1) in failing to grant a directed verdict in favor of the city and the officers on the §1983 claims; and (2) in refusing to dismiss the pendent claims because plaintiffs did not comply with the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§ 151-170. Gent and T.G.&Y. appeal separately, arguing that the trial court erred (1) in refusing to instruct the jury on the qualified

immunity Gent asserted as a defense to the § 1983 claims; (2) in permitting the jury to find that T.G.&Y. and Gent acted under color of state law for purposes of § 1983; (3) in permitting the jury to assess punitive damages against T.G.&Y.; (4) in allowing plaintiffs to introduce evidence of Gent's character from his police personnel file; and (5) in instructing the jury regarding damages for future medical expenses and loss of earning capacity. Additionally, all defendants contend that the trial court erred in awarding attorney's fees in excess of the amount provided under plaintiffs' contingent fee agreement with their attorneys.

I

This dispute arose when plaintiffs stopped at a T.G.&Y. store in Lawton, Oklahoma, on July 6, 1979. Vaughn Lusby and Alvin Lusby entered the store and Vaughn selected a pair of sunglasses. Substantial evidence supports the jury's implicit finding that Vaughn went through the checkout line and paid for the sunglasses, and then decided to return to buy some hairspray. Carrying the sunglasses, Vaughn entered the checkout line again and paid for

the hairspray. David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses, but not paying for them. Jamison summoned Charles Gent, an off-duty Lawton police officer employed by T.G.&Y. as a plain clothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him for the receipt for the sunglasses. Vaughn explained that he had paid for the glasses but had lost the receipt. Gent showed Vaughn his badge and told him that he was a Lawton police officer acting as a security guard and that Vaughn was under arrest for shoplifting. Gent and Vaughn went back inside the store to pursue the matter.

Two altercations then occurred, the precise details of which the parties dispute. Upon reentering the store Gent immediately sought to escort Vaughn to a back room. On the way to the rear of the store Vaughn stopped and raised his voice, apparently in an attempt to get the cashier's attention. Gent grabbed Vaughn around the throat using a chokehold. Vaughn struggled to loosen Gent's grip; then Gent and

other T.G.&Y. employees pinned Vaughn. Solomon and Alvin, having entered the store to see what was wrong, saw the T.G.&Y. employees wrestling with their brother and came to his aid. Another struggle ensued. During this struggle Solomon struck Gent and knocked his glasses off, and Alvin shoved Gent. At some point, Gent struck at least one of the plaintiffs with a pistol. Eventually that struggle ended, and plaintiffs and Gent went to a back office in the store.

In a few minutes Lawton police officers Wertz and Dunegan arrived at the store and took plaintiffs into custody. When they arrived at the police station, another altercation occurred. Again, the parties dispute the precise events. Plaintiffs testified that Wertz hit Alvin in the face and pushed his head into a brick wall. Once inside the jail, plaintiffs were subjected to strip searches, allegedly because Wertz and Dunegan found marijuana paraphernalia in Solomon's possession. Plaintiffs were charged with various offenses: petty larceny (Vaughn), assault and battery (Alvin, Solomon, and Vaughn), assault on a police officer (Alvin), damaging private property

(Alvin), resisting arrest (Vaughn and Solomon), disobeying a lawful order (Alvin), and possession of marijuana (Solomon). Seven months later the city dropped all charges and plaintiffs filed this suit. Meanwhile the T.G.&Y. managers checked with the cashier from whom Vaughn bought the hairspray. Although there is a conflict, the evidence overwhelmingly suggests that the cashier believed Vaughn had paid her for the sunglasses and reported this to the T.G.&Y. managers shortly after the incident.

II

The jury found all defendants liable for a violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. The provisions of § 1983 only apply to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation, custom, or usage. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Defendants contend on appeal that one or both of these elements is missing with respect to the Lusbys' claims. The § 1983 liability of the various defendants

rests on separate theories, so we consider each separately.

A

Charles Gent contends that he was not acting under color of state law while employed at the T.G.&Y. store. Alternatively, he contends that if he was so acting he is not liable because he is entitled to a qualified immunity generally accorded to law enforcement officials.

At the time Gent allegedly committed the civil rights violations, he was an off-duty Lawton police officer employed as a part-time security guard at T.G.&Y.'s store in Lawton. Gent was not wearing a police uniform, although he apparently had his police badge with him as well as a Derringer pistol--not a police issue weapon--borrowed from a fellow officer.

We must consider the circumstances under which an off-duty police officer working as a security guard acts under color of state law for purposes of a civil rights claim.[1] In Griffin v. Maryland, 378 U.S. 130 (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, and

identified himself as a deputy sheriff, arrested black park patrons who refused to leave the park in response to his order. The Supreme Court there declared, "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." Id at 135.

The Supreme Court may now apply a somewhat more restrictive test. In discussing the interrelationship of the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of 42 U.S.C. § 1983 in another context, the Court described a two-part test for determining whether conduct allegedly depriving a plaintiff of a federal right is fairly attributable to the state: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom tne State is responsible," and (2) the depriving party must be "a person

who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 (1982). The Supreme Court proceeded to describe how the concepts of state action and color of state law collapse into each other when the depriving party is one "whose official character is such as to lend the weight of the State to his decision," but are different when the constitutional claim is against a private party. Id. at 941. See also Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")

There is evidence in the record that both before and after the Lusbys' arrest, defendant Gent was acting as an on-duty police officer. When Gent accosted Vaughn Lusby, Gent flashed his badge and identified himself as a Lawton police officer working as a security guard for T.G.&Y. According to Vaughn, Gent told Vaughn moments after he stopped him that he was going to jail. Gent denied this, but conceded that

he placed Vaughn under arrest on the spot, before Gent had had any opportunity to question Vaughn or other witnesses or ascertain what had happened.[2] After the arrest Gent went to the police station to finish his paperwork on the Lusby incident. He used police documents to get information to complete the citizen's arrest forms. In addition there was evidence suggesting that Gent wanted to file charges against Alvin for assault on a police officer even though Gent was not acting as a police officer at the time he got into an altercation with Alvin and Solomon in the T.G.&Y. store.[3] Griffin and many other cases would appear to treat this as sufficient without more.[4]

If we view Gent as a private person who could be held liable only under the Lugar test, there is sufficient evidence of cooperation with the Lawton police department to conclude that he acted under color of state law. The testimony was that Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest

them. They relied entirely on Gent's word and before he completed a citizen's arrest form. The officers made no independent investigation of the shoplifting, which would have shown that Vaughn Lusby had paid for the glasses. The Lawton police chief testified that the police department routinely did not independently investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. In fact, the police department provided T.G.&Y. with special forms prepared for merchants who detained suspected shoplifters which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store, without taking the person to jail. Thus, if we treat Gent as a private party, the local police followed a policy that allowed him to substitute his judgment for that of the police. Such cooperative activity between the police department and a private party is sufficient to make Gent a party acting under color of state law.[5]

Mindful of the Supreme Court's declaration in Baker v. McCollan, 443 U.S. 137, 142 (1979),

that not every tort amounts to a deprivation of constitutional rights, we must determine whether a reasonable jury could have found Gent's conduct amounted to a violation actionable under § 1983. Malicious prosecution does not automatically constitute a denial of due process. Nevertheless, if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983. Norton v. Liddel, 620 F.2d 1375, 1378 (10th Cir. 1980); see also Cline v. Brusett, 661 F.2d 108, 112 (9th Cir. 1981). We believe that when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment. Cf. MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir.), cert. denied, 400 U.S. 852 (1970) ("It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the

events that are also the basis for the criminal charge."); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (condemning agreement in which prosecutor bargained not to press criminal charges if injured party would release police officers from all civil liability).

The plaintiffs presented evidence of several instances of Gent's actions that, viewed as a whole, represent a denial of due process. Gent initially participated in bringing the charges against all three plaintiffs. Gent signed the citizen's arrest forms as well as most of the criminal complaints. Moreover, under Oklahoma law, Gent, as one of the injured parties, could have requested the court to drop those charges for which he received satisfaction. Okla. Stat. Ann. tit. 22, §§ 1291-1294. Thus, Gent could have sought to have the charge of damaging private property dismissed after he received compensation for his broken eyeglasses, which, except for a few clay pots, was the only property destroyed in the T.G.&Y. scuffle. Instead, Gent and T.G.&Y. actively bargained with the Lusbys, seeking a release of

civil liability before they would drop the charges. Such bargaining was outrageous in light of Gent's failure to question the T.G.&Y. cashier to see if Vaughn had paid for the sunglasses, and T.G.&Y.'s managers' knowledge moments after the incident that the cashier remembered selling a pair of sunglasses to a black man, whose face she never looked at, minutes before she sold hairspray to Vaughn Lusby. The latter evidence could have persuaded the jury that Gent and T.G.&Y. knew soon after the incident that the shoplifting charge against Vaughn was groundless, yet both Gent and T.G.&Y. kept this information from the prosecutor so that charges were left pending for over seven months. Therefore, we must uphold the jury's verdict in favor of Vaughn Lusby's § 1983 claim against Gent.

Gent did not initiate the charges against Solomon and Alvin that arose after Wertz and Dunegan took them into custody, and it is not clear that he knew that those charges were groundless. Nevertheless, we conclude that the jury reasonably could have found Gent's conduct in connection with the other charges against

Solomon and Alvin an unconstitutional violation of due process. His failure to seek to have the charges dismissed once he had overwhelming evidence that Vaughn had paid for the sunglasses could be regarded as an egregious case of malicious prosecution. In so holding, we note that Oklahoma law permits suspects reasonably to resist an unlawful arrest by a peace officer who attempts to arrest the suspect for a misdemeanor not committed in the officer's presence. Sandersfield v. State, 568 P.2d 313, 315 (Okla. Crim. App. 1977) (per curiam); Walters v. State, 403 P.2d 267, 275 (Okla. Crim. App. 1965). Relatives of a suspect are privileged to come to the suspect's aid as long as the suspect himself is justified in using self-defense against excessive force by a police officer. Carter v. State, 507 P.2d 932, 933-34 (Okla. Crim. App. 1973). Therefore, the jury could have concluded that Solomon's and Alvin's attempts to free Vaughn from Gent's chokehold were privileged assaults and batteries. Consequently, for Gent and T.G.&Y. to use such charges as a bargaining chip in exchange for a

release of civil liability also violated Solomon's and Alvin's constitutional rights.

Finally, Gent may not escape liability for his constitutional violations by invoking the qualified immunity accorded to state officials. He was not entitled to an instruction on qualified immunity because even if he qualified for such immunity once he slipped into his police role during the T.G.&Y. incident, he forfeited it by acting unreasonably when he investigated the alleged shoplifting. See Allred v. Syarczkopf, 573 F.2d 1146, 1153 (10th Cir. 1978). The law evaluates such conduct primarily by objective standards, determining whether a reasonable person would have known he was violating a constitutional or statutory right. Harolow v. Fitzgerald, 457 U.S. 800, 818 (1982). In this case there is evidence that Gent did not check with the clerk operating the checkout line to see if Vaughn paid for the sunglasses. Moreover, Gent refused to let Vaughn get the cashier's attention at a time when her memory would still have been fresh.

B

The City of Lawton contends that the district court erred in refusing to direct a verdict for the city on plaintiffs' § 1983 claims. A city is not liable under the doctrine of respondeat superior in a § 1983 suit. Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978). Lawton is liable under § 1983 only if the police officers deprived plaintiffs of their constitutional rights pursuant to a policy or custom of the city. See id.

As noted above, the record contains evidence of an impermissible city policy that delegates a nondelegable duty and facilitates private abuse of criminal charges. The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchant designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants

who detained suspected shoplifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.

That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a § 1983 violation. As a result, we need not consider whether the

city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether allegations of police officer brutality sufficed to establish a pattern of such misconduct.

C

T.G.&Y. contends that the trial court erred in submitting to the jury plaintiffs' § 1983 claims against it because plaintiffs offered no evidence that T.G.&Y. acted under color of state law. T.G.&Y. is not liable for a civil rights violation simply because it employed Gent. We have held that a private entity that employs an off-duty police officer is not vicariously liable for its employee's deprivations of citizens' civil rights. Draeger v. Grand Central, Inc., 504 F.2d 142, 146 (10th Cir. 1974); see also Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982).

Nevertheless, T.G.&Y. and its managers acted under color of state law within the meaning of § 1983, because they were acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbidden rule or procedure.

See Luger v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Because Lawton's official policy was to not independently investigate citizen allegations of misdemeanors prior to arresting suspects for such misdemeanors, T.G.&Y. had authority to bring its own criminal charges by initiating a citizen's complaint, knowing the city would not exercise any check on such charges. Thus, T.G.&Y. exercised a state inquisitorial right.

Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages. This is the form that T.G.&Y. sought to have the Lusbys sign in order to have the charges

dropped. Accordingly, the jury could reasonably have concluded that T.G.&Y. was liable under § 1983.

D

Officers Wertz and Dunegan assert that the judgments against them based upon § 1983 must be reversed. Wertz and Dunegan do not contest that they acted under color of state law; they do contest the jury's finding that they deprived plaintiffs of a constitutional right.

We have no problems with Alvin Lusby's claims against Wertz and Dunegan based on Wertz' conduct while transporting Alvin to jail. A police officer's use of excessive force is actionable under § 1983 as a constitutional violation. Garrick v. City of Denver, 652 F.2d 969, 972 (10th cir. 1981); see also Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981). The plaintiffs presented ample evidence that Wertz struck Alvin on the face without cause while he was handcuffed outside the Lawton police station and then shoved Alvin head first into a wall on the way into the station. From this evidence the jury could have

concluded that Wertz used excessive force against Alvin.

We find unpersuasive Dunegan's argument that he should not be liable for his failure to stop Wertz' assault upon Alvin. An officer who fails to perform a duty may be liable under § 1983 if that failure causes deprivation of protected rights. McClelland v. Facteau, 610 F.2d at 696. Thus, although Dunegan was not liable merely because he was present at the scene of a constitutional violation, Russ v. Ratliff, 538 F.2d 799, 805 (8th Cir. 1976), cert. denied, 429 U.S. 1041 (1977), he may be liable if he had the opportunity to intervene but failed to do so. Hampton v. Hanrahan, 600 F.2d 600, 626 (7th Cir. 1979) rev'd in part on other grounds, 446 U.S. 754 (1980) (per curiam); Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972). Plaintiffs presented evidence suggesting that Dunegan could have prevented or stopped Officer Wertz' assault on Alvin Lusby. Thus, the trial court properly denied Dunegan's motion for a directed verdict.

With respect to Vaughn's and Solomon's civil rights claims against Wertz and Dunegan, plaintiffs contend the officers conducted an unconstitutional strip search. Wertz and Dunegan, on the other hand, claim they conducted the strip search because they found a roach clip on Solomon and marijuana in the police car, allegedly placed there by one of the plaintiffs while being transported. They also claim to have received information that one of the Lusbys was carrying a large knife. A strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense such as possession of marijuana. See Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984). Although defendants presented no supporting evidence about the knife they thought a plaintiff might have or of the marijuana they claimed they found, we believe a reasonable jury could not find that the strip searches were unconstitutional and actionable under § 1983.

Plaintiffs also contend that Wertz' and Dunegan's arrest of plaintiffs at the T.G.&Y. store, based solely on Gent's accusations and

without any independent police investigation to ascertain probable cause, supports the jury's finding of a civil rights violation. Police do not violate the Constitution when they arrest a person relying in good faith on a warrant that appears on its face to be valid but later provide deficient. Baker v. McCollan, 443 U.S. 137, 143-45 (1979). But they do violate the Constitution when they make a warrantless arrest without probable cause. See Draeger v. Grand Central, Inc., 504 F.2d 142, 144-45 (10th Cir. 1974); Patzig v. O'Neil, 577 F.2d 841, 848 (3d Cir. 1978); Duriso v. K-Mart, 559 F.2d 1274, 1277 (5th Cir. 1977) (per curiam); Sartin v. Commissioner of Public Safety, 535 F.2d 430, 434 (8th Cir. 1976); Street v. Surdyka, 492 F.2d 368, 371-73 (4th Cir. 1974). We do not consider Hudson v. Palmer, 52 U.S.L.W. 5052 (U.S. July 3, 1984), and Parratt v. Taylor, 451 U.S. 527 (1981), to require a different holding. Those cases involved deprivation of property, for which state post-deprivation remedies were considered adequate. A false arrest involves a deprivation of liberty; no post-deprivation remedy in the form of damages can

ever fully compensate for time wrongfully spent in custody. See Parratt, 451 U.S. at 545 (Blackmun, J., concurring).

The trial court instructed the jury on the elements of probable cause and on Officer Wertz' and Dunegan's qualified immunity as police officers. There was sufficient evidence from which the jury could conclude that a reasonable police officer in Officer Wertz' and Dunegan's position would have known he was violating the Lusbys' constitutional or statutory rights.[6] Therefore, the trial court acted properly with respect to the claims against Wertz and Dunegan, and we must affirm the jury's verdicts.

III

The City of Lawton and its police officers, Wertz and Dunegan, contend that the trial court erred in failing to dismiss plaintiffs' pendent state law claims against them as barred by the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§ 151-170. Section 156(B) of that act provides,

> "A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with clerk of the governing body of the

> political subdivision within one hundred twenty (120) days after the loss occurs."

Plaintiffs did not give written notice of their claims to the city clerk before they filed this suit.

The Oklahoma courts have not required strict compliance with § 156(B). Instead, as the Oklahoma Supreme Court has emphasized, "The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice." Reirdon v. Wilburton Board of Education, 611 P.2d 239, 241 (Okla. 1980) (footnote omitted). Thus, in Duesterhaus v. City of Edmond, 634 P.2d 720, 723 (Okla. 1981), the court held that the plaintiffs satisfied § 156(B) by verbally notifying the city attorney of their claim against the city and negotiating with him concerning settlement. Although those plaintiffs did not strictly comply with § 156 (B), the court found that they substantially complied with that provision because they gave the city sufficient notice of their claim to fulfill the purposes of the statute: to give the city the opportunity to promptly investigate the claim,

to repair any dangerous conditions, to quickly settle the claim if it was meritorious, and to prepare to meet any potential liability. Id.

Similarly, in this case, Lawton city employees Charles Gent and Eddie Hargraves tried to convince plaintiffs to enter into an agreement whereby plaintiffs would release the private party defendants from civil liability in exchange for dismissing the criminal charges against plaintiffs. As the trial court noted, "Obviously, the City had notice of possible civil claims which might be filed so that they could investigate the claims and determine their validity." Plaintiffs substantially complied with the notice provision within 120 days after they suffered their losses. Indeed, plaintiffs' malicious prosecution claim did not arise until after the prosecutor dismissed the charges against them. See Coleman v. Strong, 105 Okla. 282, 232 P.378, 379 (1925). Thus, as in Duesterhaus, plaintiffs' failure strictly to comply with the requirements of § 156(B) did not undermine the purposes of the statute. Accordingly, we agree with the trial court that

§ 156(B) does not bar plaintiffs' pendent claims.

IV

Gent argues that the trial court erred in permitting plaintiffs to introduce into evidence portions of Gent's police department personnel profile. Gent's psychological profile states, "this man is somewhat suspect in the direction of trying to 'appear good'.... Because of the possibility that Mr. Gent might tend to 'fake good' it may be necessary to observe him rather closely to determine if the personality characteristics noted above are actually a part of him." Plaintiffs' Ex. 17. The City of Lawton Employee Performance Evaluation states that during Gent's initial years of employment he had to "muster his inner resources to gain control of his temper...." Plaintiffs' Ex. 36. Contending that this evidence tends to show that he had a bad temper, Gent argues that the evidence is relevant only to show he acted in conformity with his character when he apprehended the Lusbys, an impermissible purpose under Fed. R. Evid. 404(a). Alternatively, event if the evidence is otherwise

relevant, Gent contends that its prejudicial impact substantially outweighed its probative value. Fed. R. Evid 403.

The statement in Exhibit 17 is not prejudicial. Although the statement in Exhibit tends to show that Gent at one time had a bad temper, it also indicates that Gent controlled it. The record is replete with evidence of Gent's conduct on the day he apprehended the Lusbys. We therefore are convinced that the challenged evidence did not affect the jury's verdict, and that if the trial court erred in admitting the evidence, it was harmless error.

V

The jury found T.G.&Y. liable to Vaughn Lusby on the § 1983 claim and on the pendent claims of false arrest and malicious prosecution. It awarded punitive damages of $50,000 to Vaughn against T.G.&Y.. T.G.&Y. argues that none of its conduct was sufficiently outrageous to warrant the jury's award of punitive damages.

Punitive damages are available in a § 1983 action when a "defendant's conduct is shown to be motivated by evil motive or intent, or when

it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983). The standard for awards in § 1983 actions is essentially the same as that for common law torts. Id. at 48-49, 51; see also id. at 48 n.13 (noting congruence between federal standard in § 1983 actions and Oklahoma standard for punitive damages as described in Smith v. Johnston, 591 P.2d 1260, 1264 (Okla. 1978). In Oklahoma, a jury may award punitive damages for false arrest or malicious prosecution. Moore v. Target Stores, Inc., 571 P.2d 1236, 1240-41 (Okla. Ct. App. 1977). The jury must find that the wrongdoer acted "willfully, wantonly or in reckless disregard of the rights of another, resulting in injury." White v. Conoco, Inc., 701 F.2d 1442, 1448 (10th Cir. 1983).

There is ample evidence in the record from which the jury could have concluded that T.G.&Y. acted with reckless disregard or callous indifference to Vaughn Lusby's rights. T.G.&Y. kept the criminal charges against the Lusbys pending for over seven months even though it knew within minutes of apprehending

Vaughn Lusby that he had paid for the sunglasses that he allegedly shoplifted. Malice is an element of the tort of malicious prosecution, for which the jury found T.G.&Y. liable. Similarly, the thrust of the Lusbys' civil rights claim was that T.G.&Y. abused its position of trust with the city by maliciously prosecuting the Lusbys upon citizen's complaints. Therefore, we must uphold the jury's award of punitive damages.

VI

T.G.&Y. and Gent contend that the trial court erred in instructing the jury on future medical expenses and future loss of earnings, citing Carraco Oil Co. v. Morhain, 380 P.2d 957 (Okla. 1963). In Carraco the court held that there was no basis for the jury to assess future medical expenses for the cost of an operation when the plaintiff did not present any testimony that he would have to undergo the operation. Id. at 959. Nevertheless, the court did not set aside the jury's verdict. Instead, it affirmed but reduced the verdict by an amount representing the maximum cost of the disputed operation. Id. at 961. The following

year, the Oklahoma Supreme Court explained its holding in M.K.&O. Airline Transit Co. v. Deckard, 397 P.2d 888,889 (Okla. 1964), saying that Carraco "did not require to be shown the probable cost of further medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future expenditures. Id. The opinion in M.K.&O. Airline Transit Co. affirmed a jury verdict based on an instruction on future medical expenses when the plaintiff presented a doctor's report stating that the cause of his eye pain had not been determined and that the doctor advised observation and further studies. Id. Plaintiff's daughter, for whom he was also suing, was riding in the automobile when it crashed, and plaintiff presented evidence that she would probably need psychiatric treatment. Id. at 889.

The Lusbys did not present specific evidence suggesting they would require future medical treatment. They did present an expert, Moorman

Prosser, M.D., who testified to some of the possible future physical and mental ailments that plaintiffs may suffer as a result of the T.G.&Y. incident. Dr. Prosser did not discuss even approximate damage amounts or specific courses of treatment. We cannot conclude with reasonable certainty that any of the Lusbys will require future medical care. Therefore, it was error for the judge to instruct the jury about such future medical expenses. Nevertheless, we conclude that it was harmless error that did not affect the jury's determination of damages. Dr. Prosser's testimony did not suggest any particular treatment that plaintiffs would have to undergo. As a result the jury did not hear any facts from which it could have inferred that the Lusbys would incur future medical expenses. The size of the jury awards also indicate that it is unlikely they included any amount for future medical treatment.

We find no error in the court's giving the instruction on impairment of future earnings. Plaintiffs presented evidence that Vaughn's

professional football career may have been impaired and that Solomon and Alvin may have suffered setbacks in seeking employment because of the stigma surrounding their arrest at T.G.&Y. It was up to the jury to weigh the credibility and significance of such evidence.

VII

All defendants argue that the trial court erred in awarding attorney's fees to plaintiffs in excess of the amount provided for in plaintiffs' contingent fee agreement with their attorneys. Our en banc decision in Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983), determined this issue. We there held that a fee award under U.S.C. § 1988 is not limited by a contingent fee agreement between the client and his attorney. Therefore, the trial court did not err in awarding attorney's fees in excess of the amount that plaintiffs' attorneys would have received under the contingent fee agreement.

In view of our affirmance of the award against T.G.&Y. on the § 1983 claims, we need not consider T.G.&Y.'s argument that those claims were so lacking in substance that the

court could not assume pendent jurisdiction over the claims based upon state law. See Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1056-57 (10th Cir. 1979). We also need not consider whether a jury's general verdict for lump-sum damages may be upheld on appeal when the appellate court strikes down one of several bases for liability because we have upheld every basis of liability.

AFFIRMED.

ENDNOTES TO APPENDIX A

[1] In the only case in this circuit involving an off-cuty policeman, Draeger v. Grand Central, Inc., 504 F.2d 142 (10th Cir. 1974), the court assumed, and the parties apparently did not contest, that an off-duty policeman working as a security guard in a department store was acting under color of state law.

[2] Gent's confusion of his private and public roles is evident from his testimony about what information he needed as a private citizen to arrest Vaughn for suspected shoplifting. Vaughn was ultimately charged with violating Lawton Code § 15-104, "Larceny; embezzlement," a misdemeanor offense covering thefts of less than $20. Gent thought he could make a citizen's arrest for a misdemeanor offense not committed in his presence if he had spoken to a reliable witness. Yet actually, Gent's immediate arrest of Vaughn was legal only if Gent was acting as a police officer at the time, and then only if the offense was committed in his presence.

Under Oklahoma law a peace officer may not make a lawful arrest without a warrant for a misdemeanor offense, unless the offense was committed or attempted in his presence. Catron v. City of Ponca City, 340 P.2d 504, 507 (Okla. Crim. App. 1959); see also Okla. Stat. Ann. tit. 22, §§ 196, 202; cf. Utzman v. State, 568 P.2d 641, 642 (Okla. Crim. App. 1977) (describing shoplifting in presence of a peace officer). Presumably an ordinary citizen may not conduct such an arrest either. Oklahoma has modified the law slightly for shoplifting situations so that a peace officer may arrest any person if he has "probable cause for believing [the person] has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner." Okla. Stat. Ann. tit. 22, § 1342. But this statutory exception only applies to peace officers. Cf. Okla. Stat. Ann. tit. 22, § 1343 (authorizing mere detention for a reasonable time by a merchant, his agent or employee). An off-duty police

officer serving as a private security guard must comply with the requirements of a citizen's arrest. Stewart v. State, 527 P.2d 22, 24 (Okla. Crim. App. 1974).

Gent admits that it was difficult for him to distinguish between his police officer duties and his citizen duties. This distinction may have been especially difficult because T.G.&Y. did not make any effort to train Gent about such subtleties prior to allowing him to work as a security officer.

[3] Gent originally signed the complaint against Alvin for assault on a police officer but his signature was later crossed out by Officer Wertz. The stated reason for insisting on handcuffing Alvin behind the back before leaving the T.G.&Y. was that his shoulder injury had not prevented him from hitting a police officer while at the store. Wertz testified in his deposition that he suggested to Gent that he change the assault on a police officer charge to simply assault because Gent was off-duty.

[4] See Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (action under color of state law when bank guard responded to problem as police officer by identifying himself as such and showing his police identification); Davis v. Murphy, 559 F.2d 1098, 1101 (7th Cir. 1977) (action under color of state law when Milwaukee statute provided that police officers were always subject to duty; officers in question identified themselves as police and showed their badges and guns during a brawl they started); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed, 429 U.S. 118 (1976) (action under color of state law when regulation required off-duty police officer to take action "in any type of police or criminal activity" 24 hours a day); Robinson v. Davis, 447 F.2d 753, 758-59 (4th Cir. 1971) (no action under color of state law when plaintiffs knew that college security officials in police uniform were acting as private security guards), cert. denied, 405 U.S. 979 (1972); Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 443 (8th Cir. 1950) (no state action when officer made

no pretense that he was acting under state law).

[5] See El Fundi v. Deroche, 625 F.2d 195, 196 (8th cir. 1980) (action under color of state law when private security guard acted in concert with police officers or pursuant to customary procedures agreed to by police departments); Duriso v. K-Mart, 559 F.2d 1274, 1277 (5th Cir. 1977) (court upheld jury determination of action under color of law when store had a regular form it used to initiate criminal complaint against suspected shoplifters that was part of customary plan with police); Smith v. Brookshire Brothers, Inc., 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam) (action under color of law when police took shoplifting suspects into custody according to prearranged plan whereby police did not conduct an independent investigation of the criminal charges), cert. denied, 424 U.S. 915 (1976); df. White v. Scrivner Corp., 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

[6] In this case the jury found that Wertz and Dunegan had committed false arrests only against Solomon and Alvin; it found for Vaughn on the pendent false arrest claims only against Gent and T.G.&Y. The trial judge's instruction on the elements of the Oklahoma tort of false arrest parallels the elements of a § 1983 violation founded on events involving a false arrest: the police make a warrantless arrest without probable cause. In such circumstances it would seem the jury should have reached the same conclusion on both claims. Such inconsistency does not require reversal of the judgment, however, so long as there is sufficient evidence to support the jury's verdict on the claim on which they found liability. See Malm v. United States Lines Co., 269 F. Supp. 731, 731-32 (S.D.N.Y.), aff'd per curiam, 378 F.2d 941 (2d Cir. 1967).

APPENDIX C: OPINION BELOW

[Denial of Petition for Rehearing entered by United States Court of Appeals for Tenth Circuit on January 9, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY,	)	
Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN,	)	
Defendants-Appellants.	)	

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing en banc filed by appellants City of Lawton, Oklahoma, and T.G.&Y. Stores, Inc. in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued

and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX D: OPINION BELOW

[Judgment based on jury verdict entered by United States District Court for the Western District of Oklahoma against Petitioners on December 15, 1981.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

SOLOMON LUSBY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIV-80-751-W
	)	
T.G. & Y. STORES, INC., et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

The jury having found in favor of Plaintiffs and against Defendants in the following amounts, the Court finds that Plaintiffs shall recover of the defendant T.G. & Y. actual and punitive damages of $74,000, and of the defendant Charles Gent $6,000, together with reasonable attorneys' fees of $53,665, against the above named defendants pursuant to 42 U.S.C. § 1988;

THE COURT FURTHER FINDS that upon the jury verdict herein Plaintiffs shall recover of the

defendant City of Lawton, $20,000; the defendant Wertz, $5,000; and the defendant Dunegan $4,000, together with reasonable attorneys' fees of $21,335 against these three defendants pursuant to 42 U.S.C. § 1988.

THE COURT FURTHER FINDS that Plaintiffs are entitled to recover of Defendants expenses of $5,431.49 together with costs to be taxed by the Clerk against the defendants.

IT IS SO ORDERED this 15th day of December, 1981.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-15-81

APPENDIX E: TRIAL COURT INSTRUCTIONS

[Jury INSTRUCTION No. 15 relating to "official policy" liability of the municipal petitioner, City of Lawton, Oklahoma, on September 30, 1981, by Lee R. West, trial judge, of the United States District Court of the Western District of Oklahoma.]

Instruction No. 15

LIABILITY OF THE CITY OF LAWTON

If you have found that the plaintiffs were denied any of the civil rights outlined in Instruction No. 11, then you should consider whether the City of Lawton is liable for the denial of the civil right or rights in question.

The standards for assessing liability of the City are different from the standards assessing the liability of an individual person.

If a police officer denies a person his constitutional rights, the town or city that employs that officer is not liable for such a denial or right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Lawton is not liable for the deprivation of plaintiffs' constitutional rights solely because it hired and employed the defendants

Wertz and Dunegan. But there are circumstances under which a city is liable for a deprivation of constitutional rights. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies or acquiesces in the constitutional deprivations in such a manner that such constitutional deprivations can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Lawton can be found to have authorized, sanctioned, or acquiesced in any denial of plaintiffs' rights only if an official policy which results in constitutional deprivations can be inferred from informal acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the plaintiff.

It is plaintiffs' contention that such a policy existed and they rely upon allegations that the City is grossly negligent in its

training of police officers, in the lack of continuing training during the course of their employment, and the City's failure to supervise, review, and discipline members of the police force. Plaintiffs allege that the failure of the City to adequately supervise, train, review, and discipline police officers constitutes deliberate indifference to the constitutional rights of the plaintiffs and acquiescence in the probability of serious police misconduct.

The City, of course, denies plaintiffs' allegations and further denies the existence of an official policy of the City of Lawton which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of offensive acts.

Absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, official policy such as to impose liability on the City of Lawton under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force; but a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference: or "gross negligence" on the part of officials in charge.

A municipality or city may not, under the law, assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Lawton knowingly violated plaintiffs' civil rights under this instruction, then you should find for the plaintiffs and against the City without considering any affirmative defense of good faith.

Supreme Court, U.S.
FILED
JUN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1715
No. 84-1759

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
Petitioners,

v.

SOLOMON LUSBY, et al.,
Respondents.

T.G.&Y. STORES, INC.,
Petitioner,

v.

SOLOMON LUSBY, et al.,
Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether substantial evidence of various conscious, articulated municipal policies, including a policy of non-investigation of shoplifting complaints prior to arrest, supported the jury verdict that the City of Lawton was liable for the false arrest, incarceration and continued seven month prosecution of innocent private citizens?

2. Whether substantial evidence of compliance with the notice provisions of the Oklahoma Political Subdivision Tort Claims Act permitted the submission to the jury of pendent state claims of false arrest, assault and battery, and malicious prosecution against the City of Lawton and Officers Steven Wertz and Kent Dunegan?

3. Whether the introduction of substantial evidence of T.G.&Y. Stores, Inc.'s concerted action with the City of Lawton and its own independent action in bringing about the false arrest, incarceration and continued seven month prosecution of innocent private citizens supported the jury verdict which was expressly premised on articulated findings of violations of both federal and state law?

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No. 84-1715
No. 84-1759

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
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SOLOMON LUSBY, ET AL.,
Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

Because both petitioners' statements fail to completely articulate the evidentiary bases on which the jury verdict and appellate review were premised, respondents provide this statement of the case.[1]

---

[1] References to the Record on Appeal will be identified by (ROA _____). References to the trial transcript will be identified by (Tr. _____).

On July 6, 1979, Vaughn, Solomon and Alvin Lusby (collectively "the Lusby brothers") were enroute to Oklahoma City from Lawton, Oklahoma, when they stopped at a T.G.&Y. Stores, Inc. store ("T.G.&Y.") located on Sheridan Road in Lawton to purchase a pair of sunglasses for Vaughn. Once inside the store, Vaughn selected a pair of sunglasses, went through the checkout stand with his brother Alvin, paid the cashier for the sunglasses and proceeded to wear the sunglasses. Immediately after going through the checkout area Vaughn decided to purchase some hair spray before leaving the store. He circled back around the checkout area, selected the hair spray and, carrying the sunglasses, went back to the same cashier and paid for the hair spray. He then proceeded out the door of the store. (Tr. 18-21). David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses but not paying for them. Jamison summoned Charles Gent ("Gent"), an off-duty City of Lawton police officer employed by T.G.&Y. as a plainclothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him if he had a receipt for the sunglasses. Vaughn explained that he had paid for the sunglasses but that he did not have a receipt. Gent showed Vaughn his Lawton Police Department badge, told him he was a Lawton police officer working as a security guard and that Vaughn was under arrest for shoplifting. (Tr. 23-25). Vaughn immediately suggested they go back inside the store to clear up the matter. (Tr. 22-25). It was Vaughn's desire and intention to have Gent speak with the cashier so that she would have an opportunity to vouch for the fact that he had indeed paid for the sunglasses while it was fresh in her mind. However, once inside the store, Gent refused to ask the cashier if Vaughn had paid for the sunglasses and insisted that Vaughn go directly to a back room of the store. (Tr. 26-29). When Vaughn hesitated and raised his voice in

an attempt to get the attention of the cashier, Gent grabbed him around the throat using a chokehold. Then two other employees of T.G.&Y. each grabbed one of Vaughn's arms and assisted Gent in pinning Vaughn.

As Vaughn and Gent were going back into T.G.&Y. from the parking lot, Alvin Lusby was informed by Gent that he had arrested Vaughn for shoplifting. Alvin knew one of the managers of the store and immediately proceeded to another area of the store to seek his assistance in clearing his brother. In the meantime, Solomon Lusby came back in the store to see what was taking his brothers so long. He was totally unaware of the events which had taken place between Vaughn and Gent. (Tr. 196, 197, 361).

As Solomon entered the store one of the first things he saw was his brother Vaughn with three strange men holding him down. One of the men, whom he later learned to be Gent, had his brother around the neck in a chokehold and the other two men had hold of his arms. Solomon immediately went to his brother's aid. He struck Gent to get him off his brother and they struggled for a few seconds until two men, T.G.&Y. employees, grabbed Solomon to restrain him. As the men gained control of Solomon, Gent pulled a small pistol from his waist. (Tr. 34, 199-201).

About the time Gent pulled the pistol out and started waving it around, Alvin appeared back on the scene. There was undisputed testimony that as Gent was waving the gun around he struck at least one of the brothers in the head with the gun as he was being held by T.G.&Y. employees.

It was at the point that the pistol was being wildly waved about that it became quite obvious to Vaughn that matters were getting out of hand. Vaughn had not tried to intervene while his brothers were being hit by Gent or held by the T.G.&Y. employees. He continued to try to get the situation under control. Vaughn

calmed the crowd and told his brothers and Gent to cool down, go in the back and talk about it. Vaughn was afraid the gun might accidently go off and injure someone. (Tr. 37, 630, 871, 872).

The Lusby brothers, Gent and perhaps another T.G.&Y. employee then proceeded to a back room in the store. In a few minutes two Lawton police officers, Steve Wertz and Kent Dunegan, arrived at the store and took the Lusby brothers into custody. (Tr. 44). Pursuant to the official, stated Lawton Police Department policy (Tr. 1219), no questions were asked and there was no independent investigation by the police officers. Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them, and took them to jail and put them in cells without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word to affect the arrest before he had even completed the citizen's arrest form. (Tr. 44-47, 638, 1484-87).

After the officers put the Lusby brothers in the patrol car, Alvin was able to move his handcuffs from behind his back to in front in order to relieve the pain in his shoulder. Alvin Lusby had requested that his handcuffs be placed in front because of an injured shoulder but his request was refused. (Tr. 46, 47). The fact that he had moved his handcuffs without approval of one of the officers obviously angered Officer Wertz when they arrived at the Lawton police station and he realized what had happened. (Tr. 53). There was evidence that Wertz intentionally and maliciously hit Alvin in the face with his fist and pushed him head first into a brick wall on the way into the jail area. (Tr. 53, 54, 219, 382). The testimony was reinforced by other evidence of Wertz' violent propensities as a police officer. (TR. 1101-1104, 1135-1192, 1200-1201). There was no evidence that Officer Dunegan took any action to stop the actions of Wertz.

Once in the jail area, the Lusby brothers were all subjected to strip searches. At the trial Wertz and Dunegan testified that the Lusby brothers were all strip searched because they found a roach clip among Solomon's personal possessions. (Tr. 1497, 1546). That testimony was contrary to their sworn answers to interrogatories which stated that the strip search was made because the officers had been told by someone from the T.G.&Y. store that one of the brothers had a large knife. (ROA 1498-99, Pl. Exh. 5). For whatever reason, all three Lusby brothers were strip searched. The justification for the strip searches was really unimportant as far as the Lawton Police Department was concerned because the Department had no policy concerning when a strip search was proper. That judgment was left totally to the discretion of the officer. (Tr. 1217, 1218).

The Lusby brothers were finally booked and charges filed against them for assault and battery, resisting arrest, disobeying a lawful order, shoplifting, possession of marijuana, and assault and battery on a police officer (Pl. Exh. 8, 9, 10) after Gent appeared at the station to fill out his arrest forms. (Tr. 637, 638). The brothers were released on bail after several hours in jail. Alvin immediately went to an emergency room to receive medical attention for his injuries. (Tr. 71, 390).

Seven months later, on February 27, 1980, the City of Lawton ("Lawton") dropped all charges against the Lusbys. (Tr. 657). For seven months Lawton never investigated the incidents charged against the Lusby brothers or, if it did, it left the charges pending despite overwhelming evidence that no shoplifting occurred. Further, there was overwhelming evidence that moments after the incident Gent and T.G.&Y. management knew that the cashier believed Vaughn had paid her for the sunglasses. However, during that seven month period, instead of dropping the charges Gent and T.G.&Y. bargained for a release of liability.

Lawton, through its city prosecuting attorney, also demanded from the Lusby brothers a release of civil liability before it would drop the charges. (Tr. 1361). This demand was articulated official policy; it was required of Larry Mallory, another arrestee beaten by Wertz, prior to the dropping by Lawton of charges filed against him. (Tr. 1189-90).

This case was filed on June 23, 1980. The trial began on September 16, 1981. The jury verdict in favor of the Lusby brothers was rendered on October 1, 1981. The Court of Appeals for the Tenth Circuit affirmed on November 23, 1984. On January 9, 1985, it denied rehearing and suggestions for rehearing en banc as no judge requested a poll for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. LAWTON'S PETITION RAISES ONLY EVIDENTIARY ISSUES WHICH DO NOT WARRANT THIS COURT'S REVIEW.

A. The Question Of Liability Of Lawton Based On An Alleged Single Incident Was Not Presented To Nor A Basis For The Decision Of The Appellate Court And Is Not Properly Before This Court.

Lawton, in its petition, has for the first time attempted to characterize the factual scenario as a "single incident" and has framed its question presented in terms of whether this alleged single incident may be a predicate for municipal liability. However, the question whether the false arrests, incarceration and continued seven month prosecution could even be considered a "single incident" was not presented by Lawton to the appellate court nor was it a basis for the decision. Thus, the question is not properly preserved for review by this Court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970); *Cf., City of*

Oklahoma City v. Tuttle, 53 U.S.L.W. 4639 (U.S. June 3, 1985) (single incident would be reviewed where presented to and directly decided by appellate court).

Moreover, Lawton's brief to the appellate court demonstrates that it never considered its liability to be predicated on a single incident. To the contrary, Lawton merely claimed on appeal the evidentiary insufficiency of numerous instances of police officer misconduct as one of the basis for its liability[2]. This evidence identified by Lawton was admittedly admissible as relevant to the question whether Lawton could be held liable for the actions of Officer Wertz in his assault and battery on Alvin Lusby. Lawton, on

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[2] Lawton framed its challenge on appeal as:

> THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT FOR THE CITY OF LAWTON. SINCE THERE EXISTS NO COMPETENT EVIDENCE SHOWING THE EXISTENCE OF AN OFFICIAL POLICY OR CUSTOM OF THE CITY WHICH CAUSE THE INJURIES ALLEGED UNDER 42 U.S.C. §1983.

"Brief for Appellants," City of Lawton at 20;

and further identified the numerous incidents it felt were insufficient:

> Turning to this appeal, the plaintiffs introduced seven instances of actions by police officers to establish policy or custom under §1983. They were:
>
> 1) Byron Lusby's testimony concerning an assault upon a juvenile at Marie Detty Tr. at page 986-988, lines 16-13;
>
> 2) Alford Hennessee's testimony of violence toward him at Tr. pages 1114-1120, lines 10-4;
>
> 3) Bill Hensley's testimony concerning an assault upon a prisoner at Tr. page 1102, line 17;
>
> 4) The Black cartoon incident Tr. at page 1213, line 12;
>
> 5) The deposition of Larry Mallory and Tony Tyson at Tr. pages 1135-1192;

appeal, implicitly recognized that its liability to all the Lusby brothers for the arrests and continued prosecution did not arise from a single incident but from a myriad of official policies and top-level official actions. Its inarticulate attempt to now assert the "single incident" question is wholly improper.

B. Lawton's Liability Was Not Predicated On A Single Incident; Its Mere Claim Of Evidentiary Insufficiency Does Not Warrant This Court's Review.

Lawton, in its petition, wholly fails to recognize that the predicate for its liability was not inferences to be drawn from a single incident, but substantial evidence of various conscious, articulated policies which, when carried out by Lawton officials, constituted a direct affirmative link to the constitutional deprivations suffered by the Lusby brothers. As the appellate court stated:

> The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchants designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants who detained suspected shop-

---

[2] (Continued)

6) Eddie John Hargraves' testimony concerning Steve Wertz at Tr. page 769, lines 5-9; and

7) Robert Gillian's testimony concerning Sgt. Reynolds Tr. at page 1205, line 24.

"Brief for Appellants," City of Lawton at 27.

> lifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.
>
> That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. Therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a §1983 violation.

Lawton's App. B, pp. 31-32a of the Petition For A Writ Of Certiorari.

Moreover, uncontroverted evidence at trial established that Lawton, through its city prosecuting attorney, continued to demand for seven months a release of liability from the Lusby brothers as a condition for dropping the charges. This demand was standard operating policy for Lawton. These articulated official policies and their use against the Lusby brothers served as sufficient evidentiary predicate on which the jury could reasonably have found Lawton liable under 42 U.S.C. §1983. This evidentiary predicate does not conflict with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and related cases, but is wholly congruent with them.

C. The Decision Of The Court Of Appeals Does Not Conflict With Decisions From Other Circuits.

Lawton attempts to argue that the appellate court's decision conflicts with other circuit court decisions disapproving municipal liability on the basis of a single, isolated incident. Because, as demonstrated in the appellate court's decision and in Part I.B., *supra*, the basis of Lawton's liability is not any inference which must be drawn from an isolated incident involving only a non-supervisory police officer but rather many conscious policies articulated and carried out by municipal decision-makers, including both the police chief and the city prosecuting attorney, those cases cited by Lawton are distinguishable on their facts and do not conflict with the decision of the appellate court sought to be reviewed here.

Moreover, a review of this Court's recent decision in *City of Oklahoma City v. Tuttle, supra*, demonstrates no conflict with the requirements for municipal liability articulated in that case. The various conscious, articulated municipal policies undeniably satisfy the mandate of the plurality that " 'policy' generally implies a course of action consciously chosen from among various alternatives." *Id.* at 4643. Because the evidence demonstrated that Lawton made the "conscious choice" to never (even after charges had been filed) make any independent investigation of the shoplifting arrests and to demand release of liability before the admittedly groundless charges were dismissed, the issue of municipal liability was properly submitted to the jury.

Furthermore, because the police chief and city prosecuting attorney who articulated and carried out the municipal policies which were affirmatively linked to the deprivations are, under the reasoning of *City of Oklahoma City v. Tuttle, supra*, "municipal decision-makers," *Id.* at 4642, the evidence adduced be-

low was clearly sufficient to support the jury verdict of municipal liability.

Finally, Lawton's reliance upon certain language of the appellate court in *Cowdrey v. City of Eastborough*, 730 F.2d 1376 (10th Cir. 1984), to demonstrate a conflict is unwarranted. The court, sitting en banc, reviewed and correctly articulated principles governing municipal liability, stating that an isolated incident "without more" cannot serve as a basis for liability. In this case, because there was demonstrated substantial evidence of more than an isolated incident, there exists no conflict with *Cowdrey v. City of Eastborough, supra*; rather, its reasoning supports the appellate court's decision here.

D. The Trial Court's Instruction Concerning Lawton's Liability Is Not Properly Before This Court Nor Worthy Of This Court's Review.

Lawton did not object to any instruction given by the trial court as required by Rule 51 of the Federal Rules of Civil Procedure. To the contrary, Lawton announced, "We have no objection to any of the instructions, your Honor." (Tr. 1635). Now Lawton, by including an instruction it claims is infirm and "begging this Court to read it," in its petition attempts to raise a belated objection to the instruction. This attempt must fail.

1. Rule 51 Requires That Lawton Have Made An Objection At Trial; Its Failure To Do So Precludes Review Here.

As this Court reaffirmed in *City of Oklahoma City v. Tuttle, supra*, Rule 51 requires that an objection to an instruction be made *at trial*. Failure to do so must waive the objection. Moreover, because Lawton failed to raise any error in the instruction before the appellate court, the instruction is not properly before this Court for review. To the contrary, Lawton argued on

appeal not that there was any infirmity with the instruction or that its liability even turned on a single incident, but that demonstrated multiple incidents of violence could not serve as an evidentiary predicate for Lawton's liability.

2. The Decision Below Was Correct, Notwithstanding The Giving Of An Instruction Which Referred To "Single Incident" Liability.

The infirmity identified by this Court in the instruction in *City of Oklahoma City v. Tuttle, supra*, an instruction admittedly very similar to the one given in this instance, is not present here. The jury returned a special verdict in which it independently found Lawton liable to two of the Lusby brothers on pendent state claims properly submitted[3] to it which did not require exclusive reliance on an arguably impermissible instruction. Thus, because there exists an independent, clearly discernible basis for the jury's verdict, reversal is not appropriate. The general verdict, fatal in *Tuttle*, was not used here.

As this Court stated in *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. 2733 (1983), when there is evidence in the record that the verdict did not rest exclusively on an impermissible portion of an instruction, the giving of the instruction need not mandate reversal. *Id.* at 2745. When there is no uncertainty that an independent basis existed, affirmance is permitted. *Id.* Here, where the verdict obtained from sufficient pendent state claims, review is not necessary; the result is clearly correct. Moreover, because in this case the arguably infirm instruction did not relate to constitutionally protected activity by petitioners as was present in *Stromberg v. California*, 283 U.S. 359 (1931), reversal is not required. *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. at 2746.

---

[3] See Part II, *infra*.

Furthermore, in *Tuttle*, respondent's exclusive theory of recovery, lack of training, might have allowed liability to have been found solely on the basis of an inference drawn from a single incident. Here, because the jury was not required to "infer" the existence of any policy, much less a lack of training, as the predicate for liability, the infirmity does not exist. To the contrary, the articulated, conscious decisions made by municipal policymakers served as the permissible predicate on which the jury could find liability.

E. Lawton's Claim Of Prejudice Accruing From The Appellate Court's Articulation Of The Municipal Policy Which Created The Affirmative Link Between Lawton And The Constitutional Violation Is Not Supported By The Facts Nor The Law And Merits No Review.

Lawton asserts that the muncipal policy of non-investigation and delegation of a non-delegable duty articulated by the appellate court as the basis for its liability was not considered or litigated at trial. To the contrary, as set forth in the trial transcript, this policy and other questionable municipal policies were presented to the jury. That evidence could thus be a basis for affirmance, on appeal, of the jury verdict. "Jury findings on disputed matters of fact will be upheld by the reviewing court if substantial evidence exists to support them." *Control Components, Inc. v. Valtek, Inc.*, 609 F.2d 763 (5th Cir.), *cert. denied*, 449 U.S. 1022 (1980), citing *Kiva Corporation v. Baker Oil Tools, Inc.*, 412 F.2d 546 (5th Cir. 1969); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Moreover, as set forth in Part I.A., *supra*, Lawton chose, in its brief on appeal, to challenge only the sufficiency of certain evidence in attempting to argue insufficiency of a series of prior and subsequent inci-

dents of violence and misconduct by Lawton police officers. Lawton's own limitation of the issue on appeal cannot limit the appellate court's review of the record or articulation of other competent evidence as the basis for Lawton's liability.

Lawton cannot seriously contend that no evidence of the articulated municipal policy was presented at trial; it rather seems to assert that, given a second opportunity at trial, it might prove to the jury that its policies were permissible. This plea for a second chance at challenging the Lusby brothers' competent evidence cannot be a basis for the granting of the requested writ.

Finally, Lawton's reliance on two cases, *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979), and *Armstrong Cork Co. v. Lyons*, 366 F.2d 206 (8th Cir. 1966), is misplaced. While those cases do contain language relevant to a claim of prejudice resulting from a shifting of the issues, the act of shifting of the issues which occasioned the claim of prejudice occurred at trial. Unlike those fact situations, Lawton is not faced with a shifting of the issues at trial or an amendment of the complaint by an opposing party but with appellate affirmance of a jury verdict based on its articulation of competent evidence submitted at trial but ignored by Lawton on appeal.

II. THE FACT QUESTION WHETHER THE LUSBY BROTHERS COMPLIED WITH STATE LAW REQUIREMENTS WAS PROPERLY DECIDED BELOW.

A. Lawton's Issue Is Purely Factual And Raises No Novel Or Controversial Federal Or Constitutional Question.

Lawton argues that the facts of this case do not present sufficient evidence that the Lusby brothers complied with the notice requirement of the Oklahoma Political Subdivision Tort Claims Act,

Okla.Stat. tit. 51, §151-170 (1981) (the "Tort Claims Act"). This argument does not merit review by this Court because it concerns admitted fact questions relating to compliance with state laws which implicate no constitutional or federal questions.

B. The Court Of Appeals Correctly Decided That, Under These Facts, The Lusby Brothers Had Substantially Complied With The Notice Requirement Of The Tort Claims Act.

In determining whether the Lusby brothers complied with the notice requirement of the Tort Claims Act, the question of fact is whether the Lusby brothers' actions constituted notice to Lawton. Review of the facts on which the appellate court premised its determination that the trial court was correct in its finding that the Lusby brothers had complied with the notice provision in light of the appropriate judicial interpretation demonstrates that the Lusby brothers "substantially complied" with the notice requirement. Moreover, because according to Oklahoma's interpretation of state law Lawton suffered no prejudice, the Tort Claims Act cannot be any bar to the pendent claims. *Duesterhaus v. City of Edmond*, 634 P.2d 720, 722 (Okla. 1981); *Reirdon v. Wilburton Board of Education*, 611 P.2d 239, 241 (Okla. 1980).

In evaluating this question, reasoning of the Supreme Court of the State of Oklahoma as to the Tort Claims Act must be noted:

> The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice.

Reirdon v. Wilburton Board of Education, 611 P.2d at 241.

Such a construction comports with the purpose of the Tort Claims Act: to provide justice for the plaintiff

while preventing prejudice to the defendant. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Here, until the date of dismissal of the charges, Lawton, because of its demand through its city prosecuting attorney that the Lusby brothers release all claims, was obviously aware of the monetary claim which became the substance of the lawsuit; within 120 days of that dismissal date the claims had not grown stale; prompt investigation and the preparation of a competent defense was possible; settlement discussions, had Lawton wished to undertake them, could easily have been initiated. There simply was no prejudice which accrued to Lawton as would permit a statutory bar here. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The Lusby brothers have, according to the controlling authority of the Supreme Court of the State of Oklahoma, complied with the Tort Claims Act because there has been no prejudice to Lawton.

Moreover, not only is it clear that no prejudice resulted, but the Lusby brothers also have unquestionably substantially complied with the method of notice set forth in the statute as interpreted by the Supreme Court of the State of Oklahoma in *Duesterhaus v. City of Edmond, supra*, and *Reirdon v. Wilburton Board of Education, supra.*

The Lusby brothers provided verbal notification to the Lawton city prosecuting attorney that monetary relief was demanded in the negotiations concerning and ultimate refusal of the city prosecuting attorney's continued demand, not merely the demand of two police officers, to release their claims prior to the February 27, 1980, dismissal of the charges. Such verbal notice to the city prosecuting attorney and negotiation has *explicitly* been held to be substantial compliance by the Supreme Court of the State of Oklahoma. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Written notice is simply not a requirement mandated by the Oklahoma Supreme Court.

Furthermore, the Lusby brothers' choice of verbal notice and their filing of a federal lawsuit cannot be said, considering the liberal construction given by the Oklahoma Supreme Court, to be less than substantial compliance with any written notice requirement which might survive *Duesterhaus v. City of Edmond, supra.* Again, the key factor here, as demonstrated by Oklahoma Supreme Court authority, is the lack of prejudice accruing to Lawton. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The mandate of the Oklahoma Supreme Court has been met; there was substantial compliance with the notice requirement of the Tort Claims Act; there was no prejudice to Lawton.

Finally, Lawton's belated suggestion that this question be certified to the Oklahoma Supreme Court is inappropriate. The question is not a question of law which under the Oklahoma Statute[4] may be certified, but a question of fact which, because of abundant Oklahoma authority considered and cited by the trial and appellate courts in their review of the facts, need not be certified. *See Lehman Brothers v. Schein*, 416 U.S. 386, 388-89 (1974) (Rehnquist, J., concurring). Moreover, because the notice question would not aid the resolution of any constitutional claim, certification is not appropriate here. *Cf., Zant v. Stephens*, 456 U.S. 410, 416 (1982).

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[4] The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

Okla.Stat. tit. 20, §1602 (1981).

III. T.G.&Y.'S ATTEMPT TO REARGUE EVIDENCE PRESENTED BELOW DOES NOT MERIT REVIEW BY THIS COURT.

A. T.G.&Y. Does Not Challenge The Submission Of Or Its Demonstrated Liability Founded On Pendent Claims, Thus Providing An Independent Basis For The Jury Verdict Which Precludes Review.

Because the jury specifically found, and T.G.&Y. does not challenge, its liability on various pendent state claims, including false arrest, as to all the Lusby brothers, should this Court question whether the §1983 liability was appropriate the result would still be the same. T.G.&Y. is liable to the Lusby brothers for damages as determined by the jury. Clearly, the petition for a writ of certiorari must be denied.

B. T.G.&Y.'s Issue Is Wholly Factual And Presents No Novel Question Or Conflict Of Law.

T.G.&Y. does not challenge the trial and appellate courts' findings that its employee, Gent, acted under color of law. Moreover, according to T.G.&.Y.'s *own* statement at page seven of its petition for a writ of certiorari, the only issue raised is whether, *under these facts*, T.G.&Y. can be said to have acted under color of law. Because the determination of this question depends on the unique facts attendant to the false arrest, incarceration and continued prosecution of the Lusby brothers and raises no question of law which would impact on future litigants, this case does not merit review by this Court.

T.G.&Y. attempts to present this case in the posture of findings of the appellate court, ignoring the fact that the appellate court's recitation of the evidence on which T.G.&Y.'s liability was predicated was based on substantial and competent evidence pre-

sented at the trial court level. The question whether T.G.&Y. acted under "color of law" was fully and completely considered at the trial court level; the facts adduced before the trial court support the determination that T.G.&Y. acted under "color of law."

T.G.&Y. merely argues there was no evidence supporting its willful participation in concerted activity. However, evidence to the contrary was demonstrated at trial. T.G.&Y. relied solely on the Lawton police force for training of its security guards. At trial T.G.&Y. explicitly admitted it had determined to hire *only* Lawton police officers as security guards. (Tr. 890). Testimony indicated that T.G.&Y. allowed one such Lawton police officer/security guard to virtually hire the other security guards. (Tr. 737). T.G.&Y.'s manager's own testimony indicated that no background check was performed. (Tr. 845, 846). According to T.G.&Y.'s own testimony it has maintained a policy whereby, during the arrests of shoplifters, members of the Lawton Police Department filled out citizen's arrest forms which should have been filled out by T.G.&Y. (Tr. 858, 859). No investigation of shoplifting was done by Lawton police officers at the time they were called to the store (Tr. 857, 858), nor was there even a requirement of T.G.&Y. by Lawton that all the proper forms be filled out at the time of arrest. T.G.&Y. successfully created a scenario in which it had authority to bring its own criminal charges by initiating a citizen's complaint because T.G.&Y. knew Lawton would not exercise any check on such charges. In this instance it was the very fact of Gent's status as a Lawton police officer and T.G.&Y.'s use of that status that created the scenario in which the Lusby brothers were officially incarcerated, physically abused and then maliciously prosecuted for more than seven months.

These facts, in addition to those articulated by the appellate court, support the trial court's finding and

the jury verdict. The authority cited by the appellate court clearly creates no conflict with the facts here, nor has T.G.&Y. raised any conflict with other established cases. Furthermore, the appellate court recognized, at n.5 of its opinion (App. A, p. 23a, T.G.&Y. petition), the apposite authority persuasive to its decision. *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976); *Cf., White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

Moreover, T.G.&Y.'s argument that its demand of a release of civil liability is a basis for a finding that it acted under color of law is erroneous. The Tenth Circuit found that T.G.&Y.'s demand of a release was one of the acts which caused the violation — not the act that created the "color of law" requirement. As the court stated:

> Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages.

App. A, p.13a, T.G.&Y. petition.

Additionally, T.G.&Y.'s apparent belief that the appellate court held that T.G.&Y. acted under color of law when it failed to dismiss charges against the Lusby brothers under an Oklahoma state statute which provides that a complaining party may, after satisfac-

tion, cause criminal charges to be dismissed is a misreading of the court's opinion. The abuse of the statute was not a basis for the "color of law" requirement; it was a basis for liability. Here T.G.&Y. has not contested its liability for the false arrest — only that it acted under color of law. Its insubstantial arguments challenging the finding of liability do not warrant review.

CONCLUSION

Because petitioners present only questions of fact bereft of any federal or constitutional questions of great import, and because the decision below is consistent with apposite rulings of this Court and circuit courts, the petitions for writs of certiorari must be denied.

Respectfully submitted,

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June, 1985

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No. 84-1715
No. 84-1759

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
Petitioners,

V.

SOLOMON LUSBY, et al.,
Respondents.

T.G.&Y. STORES, INC.,
Petitioner,

V.

SOLOMON LUSBY, VAUGHN LUSBY
and ALVIN JERARD LUSBY,
Respondents.

REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

COMES NOW the Petitioner, T.G.&Y. Stores, Inc., and pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, hereby files this Reply Brief addressed to the arguments raised in the Brief in Opposition filed by the Respondents. As this Court will

recall, two separate Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit have been filed in this consolidated matter. In the Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit the Respondents devote slightly over three (3) pages to the issues and arguments raised in this Petitioner's Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. However, in these three pages the Respondents make statements to which this Petitioner feels compelled to respond.

ARGUMENTS OF THE RESPONDENTS

A. The Effect of the Submission of Claims under 42 U.S.C. §1983.

Initially, the Respondents urge that because the jury found liability on various pendent state claims the result in this case would be the same, even if this Court should question whether the liability under 42 U.S.C. §1983 was appropriate. This statement fails to take into account the fact that the verdict forms used by the Court did not require the jury to separate damages on the particular claims except among actual, nominal and punitive damages. Thus, although the jury found in favor of the Respondents on various pendent state claims, it is impossible to determine the amount of actual damages which would have been awarded against this Petitioner had the §1983 claims not been placed before the jury. This very matter has previously been briefed and the Petitioner would refer this Court to Proposition II(A) of the Reply Brief of Appellants, T.G.&Y. Stores, Inc. and Charles Gent, filed in the United States Court of Appeals for the Tenth Circuit on May 9, 1983. Of course, the Petitioner has at all times taken the position that the §1983 claims were inappropriately placed in this lawsuit, and

thus, the District Court for the Western District of Oklahoma should not have continued to hear the pendent state claims.

In this connection, another factor which must be considered involves the finding of the United States Court of Appeals for the Tenth Circuit that the trial court erred in instructing the jury on future medical expenses. More specifically, the Tenth Circuit found that the Respondents did not present specific evidence suggesting they would require future medical treatment, and thus, it could not be concluded with reasonable certainty that any of the Respondents would require future medical care. The Tenth Circuit found that it was error for the trial judge to have instructed the jury about such future medical expenses, but concluded that it was harmless error that did not affect the jury's determination of damages. The Petitioner strongly asserts that the erroneous instructions regarding damages, when considered in conjunction with the trial court's error in submitting the §1983 claims to the jury, created an atmosphere wherein this Petitioner was deprived of a fair trial on all matters submitted to the jury.

One final consideration with regard to the effect of the §1983 claim is that concerning the large amount of attorneys' fees awarded by the trial court in this action. In Appendix C attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by this Petitioner, this Court will find a reproduction of the judgment entered by the trial court in this matter. This judgment provides that the amount of $53,665.00 was awarded as reasonable attorneys' fees, said amount being awarded pursuant to 42 U.S.C. §1988 and to be paid by this Petitioner. Although the Respondents asserted claims under 42 U.S.C. §1985(3) and 42 U.S.C. §1986, the jury found in favor of this Petitioner on each of those claims. Thus, in the

absence of the finding of liability under §1983, the trial court would have had no basis for the awarding of attorneys' fees in this matter.

The Petitioner strongly urges that the Respondents' argument that the result in this case would have been the same even without the §1983 claims being placed before the jury is totally erroneous. The Petitioner states that the §1983 claim strongly influenced the amount of actual and punitive damages awarded against it. Further, there can be no question that the finding of liability on the §1983 claim established an otherwise nonexistent basis for the awarding of attorneys' fees, said award exceeding the amount of actual damages awarded against this Petitioner by almost $30,000.00.

B. Application of the Issues Presented

The Respondents next argue that the issues presented by this Petitioner are wholly factual and present no novel question or conflict of law. The Respondents initially argue that this Petitioner does not challenge the trial and appellate courts' findings that its employee, Charles Gent, acted under color of law. The Petitioner is uncertain why Respondents have made this statement, as all courts involved in this case have previously and correctly recognized that there can be no liability on the part of this Petitioner based upon a respondeat superior theory. (Instruction No. 14 and p. 13a of Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit). In any event, Rule 19.6 of the Rules of the Supreme Court of the United States clearly will make Charles Gent a party herein should this Court grant the Petition for Writ of Certiorari. At that time, it will be appropriate to raise any challenge to the trial and appellate courts' finding that Charles Gent acted under color of law. It should be noted that Charles Gent has previously raised questions regarding the appropriateness of the finding of liability

as to him, particularly directed to whether he was entitled to a good faith defense instruction. Thus, Charles Gent supports the position of the Petitioners herein in favor of granting the Petition for Writ of Certiorari.

The Respondents argue that the only issue raised by the Petition for Writ of Certiorari is limited to the facts established by the evidence in this case. As a result, the Respondents state that because the determination of the question presented depends on the unique facts occurring in conjunction with this incident, there is no question of law which would impact on future litigants worthy of merit by this Court. Of course, the only issue presented in each and every case before this Court is to some degree based upon the particular facts and circumstances existing in that case. However, this does not preclude the applicability of this Court's decision to numerous other cases. As the Petitioner has previously asserted, the issues before this Court are of concern to every private individual and entity in the United States. The decision reached by the United States District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit, has created a situation in which each private individual and entity is potentially liable under the provisions of 42 U.S.C. §1983 even though that private individual or entity does not act in concert with a state entity or under color of law. Therefore, the scope of the protections of 42 U.S.C. §1983, and its application to the conduct of private individuals or entities, are involved in this Petition for Writ of Certiorari. Accordingly, the questions of law presented herein are extremely important to a wide variety of future litigants in every court faced with similar questions.

C. The Evidence

The Petitioner has never ignored the evidence presented at the trial court level, and presents this case in the posture of the findings of the Tenth Circuit for the

convenience of this Court in its determination of whether to grant the Petition for Writ of Certiorari. The Petitioner strongly disagrees with any suggestion that there was substantial and competent evidence presented at the trial court level justifying the finding that this Petitioner acted under "color of law". This Court has been presented with totally diverse opinions as to whether the evidence presented justifies any finding of liability on the part of this Petitioner under 42 U.S.C. §1983. The only method by which this conflict can finally be resolved is for this Court to review the trial court record.

In reviewing the summary of the evidence contained on p. 19 of the Respondents' Consolidated Brief, the Petitioner strongly asserts that the evidence contained in that summary is not sufficient to invoke the provisions of §1983. Even if each and every statement contained therein is accepted as true, those statements do not establish a sufficient basis for finding that this Petitioner acted under "color of law". This Petitioner reurges that there was no evidence presented in the trial of this action establishing any willful participation in a joint activity with the City of Lawton, and there was no evidence presented establishing that the Petitioner had any knowledge of the policies and customs of the City of Lawton.

It is somewhat incredible that the Respondents argue that the Petitioner created a scenario in which it had the authority to bring its own criminal charges by initiating a citizen's complaint because it knew that the City of Lawton would not exercise any check on such charges. Such an allegation is totally unsupported by the evidence in this case, which demonstrated at most the mere filing of a citizen's complaint by a private individual or entity by the use of the exclusive method presented by the City of Lawton. Although the Respondents attempt to use the off-duty status of Charles Gent in

establishing the "color of law" requirement, this device has previously been correctly rejected by both the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

D. The Appellate Court Opinion

The Petitioner disagrees with the Respondents reading of the appellate court opinion herein. While the Respondents urge that the demand of a release of civil liability was one of the acts which caused the violation of their constitutional rights, and that somehow the alleged abuse of the statute can be separated as a basis for liability from a basis for "color of law", the Petitioner disagrees. In its opinion, the Tenth Circuit necessarily must have found that the Petitioner was acting under color of law when it failed to dismiss the charges; otherwise, there could have been no finding of liability for those acts.

The question that must be determined is whether the Tenth Circuit found that the Petitioner had continuously acted under "color of law" from the moment of the filing of the citizen's charges, or, alternatively, whether the Petitioner acted under "color of law" at the time of filing the charges, and subsequently acted under "color of law" at a separate point in time when it allegedly used the charges as a "bargaining chip" in exchange for the release of civil liability. There can be no doubt that the Tenth Circuit did conclude that the Petitioner acted under color of law when bargaining for the release of the civil liability. Accordingly, the Petitioner believes that it appropriately presented its second question as being whether action under color of state law is present under §1983 when a private merchantile establishment seeks to obtain a release for all civil liability from a suspected shoplifter in exchange for the dismissal of all criminal charges brought by way of a citizen's complaint.

RECENT DECISION OF IMPORTANCE

One final matter that must be brought to this Court's attention concerns its recent decision in the case of *City of Oklahoma City v. Tuttle*, Case No. 83-1919. This matter was before the Court on a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Certiorari was granted because of the Court of Appeals' holding that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability. In this Court's decision it reviewed the trial court's instruction on municipal liability which included language that "... but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." After considering the applicability of §1983 to the facts of that case, this Court concluded, at p.12 of the slip opinion:

> ...But unfortunately for respondent, the instruction given by the District Court allowed the jury to impose liability on the basis as such a single incident without the benefit of the additional evidence ...
>
> ... We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a §1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The foregoing discussion of the origins of *Monell's* "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability

> under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple".

The Court further concluded, at p. 15:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Upon the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a non-policymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly *Reversed*.

The Petitioner believes that this Court should be informed that the identical language found to be lacking in *Tuttle* was contained in the instruction given to the jury in the case at bar. (Instruction No. 15). In light of the reversible nature of such an instruction the Petitioner

would respectfully suggest that this Court might consider remanding this case to the United States Court of Appeals for the Tenth Circuit with directions to reconsider its opinion.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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By:

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September, 1985

CERTIFICATE OF SERVICE

I, Michael W. Hinkle, a member of the Bar of the Supreme Court of the United States and counsel of record for T.G.&Y. Stores, Inc., Petitioner herein, hereby certify that on August 30, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Reply to Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties herein, as follows:

On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Jack L. Kinzie and Gretchen A. Harris, and to Linda G. Scoggins, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

On the City of Lawton, Oklahoma, a separate Petitioner herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Russell D. Bennett, the above named Petitioners' counsel of record, at 103 S.W. 4th Street, Lawton, Oklahoma, 73501.

All parties required to be served have been served.

Dated September 3, 1985.

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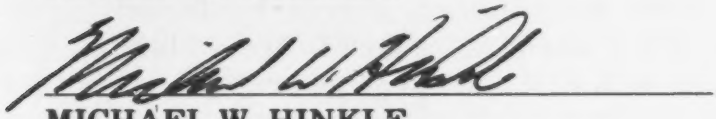

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